FABLE J. AVISON
Fable.Avison@law.nyls.edu| (732) 610-2225 | Jersey City, NJ 07302

June 25, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

My name is Fable Avison and I am applying for a law clerk position in your chambers for the term beginning in August 2024. I am a recent graduate of New York Law School, graduating Magna Cum Laude and standing within the top 4% of my class. I have worked towards a federal clerkship throughout law school by prioritizing relevant courses such as federal courts, legal research, and judicial internships in the Southern District of New York and the District of New Jersey.

I am seeking a clerkship to continue to engage with questions about what the law is and how its terms should be understood I am interested in working with Your Honor because of your dedication to public service. I am particularly interested to learn from your experience and to engage with the procedural and threshold questions that trial court judges are often asked to answer in the early stages of litigation.

I have demonstrated proficiency in my legal studies throughout law school and have assumed an editorial board position on the New York Law School Law Review. As Executive Notes and Comments Editor for the Law Review, my role was to help students develop novel legal theories and to find their voice through their writing. The job requires expertise in diverse areas of the law on short notice and a mastery of the Bluebook—two of my favorite facets of the role. Last month, my Case Comment discussing a federal trade secrets case decided in the Southern District of New York was published in the second issue of Volume 67 of the New York Law School Law Review.

Currently, (in addition to preparing for the New York Bar Exam) I am assisting Professor David Schoenbrod as his research assistant. In this role, I am assisting with the drafting and editing of a book concerning American politics and civics. This project involves a diverse study, from Greek mythology to *The Federalist Papers*. At this stage in the project, my role is largely editorial. This opportunity to work closely with a professor on a piece of writing has been a privilege. I have worked to maintain the author's voice while making thoughtful suggestions when relevant. I cannot think of anything more relevant for a future law clerk who will soon be tasked with research projects and similar editorial tasks.

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My dedication to the federal judiciary's work and research and writing skills make me the perfect candidate to serve as a law clerk in your chambers. Thank you for your consideration.

Respectfully,
Fable J. Avison

FABLE J. AVISON

Fable.Avison@law.nyls.edu| (732) 610-2225 | Jersey City, NJ 07306

EDUCATION

New York Law School, New York, NY
Juris Doctor, June 2023
GPA: 3.86
Rank: 10/251
Honors: *Magna Cum Laude*, Dean's Leadership Council, Dean's List High Honors, Trustee Scholar (full-tuition, merit-based scholarship)
Activities: *New York Law School Law Review*: Executive Notes & Comments Editor, New York Law School Moot Court Association, Teaching Assistant: Constitutional Law, Civil Procedure, Evidence
Publication: *Zurich American Life Insurance Company v. Nagel*, 67 N.Y.L. SCH. L. REV. 81 (2023)

Smith College, Northampton, MA
Bachelor of Arts, Government May 2018
Concentration: Political Theory

EXPERIENCE

Professor David S. Schoenbrod, (New York Law School) New York, NY
Research Assistant, Current
Assisting with the drafting and research for an upcoming book discussing American politics and the history of government .

Shearman & Sterling LLP, New York, NY
Summer Associate, Summer 2022
Reported on research on legal issues pertaining to antitrust litigation and internal investigations concerning unfair competition. Worked closely with the firm's foreign anti-corruption practice to research whistleblower protections.

The Honorable George B. Daniels, U.S. District Court for the Southern District of New York, New York, NY
Judicial Extern, Spring 2022
Drafted judicial opinions and conducted research on complex litigation matters including Social Security benefits.

Veterans Justice Field Placement (Manhattan Legal Services), New York, NY
Extern, Fall 2021
Provided legal services to low-income veterans in the New York City area. Researched and drafted client responses and litigation documents regarding small claims, housing disputes, child support arrears, and Social Security claims.

The Honorable Madeline Cox Arleo, U.S. District Court for the District of New Jersey, Newark, NJ
Judicial Intern, Summer 2021
Researched and drafted motion responses and opinions for a wide range of legal issues including civil rights matters and social security disability benefits.

Harrison, Harrison & Associates, Ltd., New York, NY
Legal Assistant, 2019–21
Drafted and assisted with the production of documents, client intakes, and court proceedings for a boutique employment law firm.

SKILLS & INTERESTS

Olympic Weightlifting (Competed in U-25 National Championships, 2021); World Travel; Historical Fiction

6/15/2023

@00083755 Ms Fable Avison Degree Sought: JD

Fall 2020

Course		Credits	Final Grade	Level
REQ 550	Torts - 2MB	4	B+	01
LWR 201	Legal Practice I - L2D	3	CR	01
REQ 400	Criminal Law - 2L	3	B	01
REQ 300	Contracts - 2SD	4	B+	01
REQ 080	Foundations for Study of Law	1	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	15	15	15	15	3.24
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Spring 2021

Course		Credits	Final Grade	Level
REQ 105	Advanced Legal Methods - 2A	2	A	01
REQ 100	Civil Procedure - 2	4	A	01
LWR 301	Legal Practice II - L2D	4	A	01
REQ 150	Legislation & Regulation - 2	1	P	01
REQ 500	Property - 2	4	A	01
REQ 081	Foundations for Professionalsm	0	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	15	15	15	15	4.00
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Summer 2021

Course		Credits	Final Grade	Level
BUS 210	Corporations	4	A	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	4	4	4	4	4.00
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Fall 2021

Course		Credits	Final Grade	Level
REQ 200	Constitutional Law I	3	A	01
REQ 650	Evidence	3	A	01
JRN 100	Law Review - Legal Scholarship	0	CR	01
LRJ 500	Law Review Member I	1	CR	01
CLC 520	Veterans Justice Field Placmnt	2	A-	01
LWR 340	Drafting: Litigation	2	A-	01
CLC 521	Veterans Justice Seminar	2	A-	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	3.84
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

NEW YORK LAW SCHOOL

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6/15/2023

@00083755 Ms Fable Avison Degree Sought: JD

Spring 2022

Course		Credits	Final Grade	Level
REQ 250	Constitutional Law II	3	A+	01
EXT 210	Judicial Externship Seminar	1	A	01
EXT 800	Jud Extern Placement: Fed Jud	2	P	01
LRJ 501	Law Review Member II	1	CR	01
MJD 120	Federal Courts/Federal System	3	A	01
REQ 450	Professional Responsibility	3	A+	01
ILS 375	Law of Economics of Litigation	1	P	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	14	14	14	14	4.20
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Fall 2022

Course		Credits	Final Grade	Level
EST 140	Wills, Trusts&Future Int. - O	4	A-	01
CRI 100	Crim Pro: Investigation - EVE	3	A+	01
LRJ 900	Law Review Exec Bd I	2	CR	01
MCA 902	Moot Court Member	1	CR	01
LWR 310	Legal Research in Digital Wrld	3	A+	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	4.07
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

Spring 2023

Course		Credits	Final Grade	Level
MBE 101	Introduction to the MBE - O	3	B+	01
JLH 504	Persuasion	2	A	01
BUS 300	Accounting & Data Analysis - O	2	P	01
LRJ 901	Law Review Exec Bd II	2	CR	01
MCA 902	Moot Court Member	1	CR	01
CON 527	The First Amendment	3	A	01

	Attempted	Earned	GPA Crd	QPnts	GPA
Term:	13	13	13	13	3.75
Total Institution:	*87*	*87*	*87*	*266.2*	*3.86*

June 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Reference for Fable Avison

Dear Judge Walker:

I am writing to offer my unqualified and enthusiastic support for Fable Avison's application for a clerkship in your chambers. Fable took Constitutional Law I with me in Fall 2021 and is currently completing Constitutional Law II with me this Spring. Her maturity, intelligence, and deep commitment to high standards place her among the top students I've worked with in the last few years, and I hope you will give her application serious consideration.

From the first day of class, Fable distinguished herself as a student who was deeply engaged with the material, intellectually curious, articulate, motivated, and well prepared. She actively engaged with difficult areas of legal doctrine, asked incisive questions, and consistently demonstrating her ability to carefully parse complex cases and analyze arguments on both sides of a dispute. Throughout the year, her enthusiasm for constitutional law has shone through in a way that would make any professor proud, and I repeatedly saw her work closely with other students to explain material and improve their understanding of the law. As a result, I plan to offer her a position as a teaching assistant when I teach the course next year.

On a personal level, Fable is extremely nice and congenial. She is exactly the sort of person I would look for in a judicial clerk: hard-working, professional, smart, thorough, responsible, easy to work with, and eager to learn. Fable is also extremely excited about the possibility of clerking and has consciously selected classes and externship opportunities that will allow her to hit the ground running.

In sum, I have no hesitation in offering Fable my highest recommendation for the clerkship position. I have no doubt that Fable will make an excellent attorney one day, and that she will benefit immeasurably from the opportunity to work with you. If you have any additional questions, please feel free to contact me by email at doni.gewirtzman@nyls.edu or by phone at 212-431-2134.

Sincerely,

Doni Gewirtzman
Professor of Law

June 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Fable Avison for a judicial clerkship. I can do so enthusiastically and confidently because, as my research assistant, she is doing the tasks that I once did as a law clerk for Judge Spottswood W. Robinson of the DC Circuit but to a higher standard than I did.

As my research assistant, Ms. Avison is helping me write a book about the function of accountability under the federal constitution. My practice is to give her rough drafts of chapters and ask her to do the legal and factual research to help me make my points more convincingly. That she does, and very well. Indeed, she finds sources from far afield. Along the way, she gently suggests line edits to comb the style into shape. This is the precisely the sort of work product that the very best of my research assistants have done over the decades.

She, however, does something else. She sometimes suggests rearranging of the order of my arguments to make them, she claims, more convincing. I usually agree with her. This contribution has surprised me because none of my research assistants over the decades have done that. And she does it in the gentlest of ways. I can see why the law review made her Executive Notes and Comments Editor.

The book that I am writing draws upon both political theory and Greek mythology. So, it is an additional blessing that she is knowledgeable in these fields. Her specific fields of knowledge are not, however, the point. The point is she is a thoughtful helper who takes initiative and delivers. She has kept every promise.

I heartily recommend Fable. Should you have any questions, please feel free to contact me.

Sincerely,

David Schoenbrod

David Schoenbrod - David.Schoenbrod@nyls.edu - 212.431.2339

June 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Ms. Fable J. Avison who is applying for a clerkship with Your Honor.

I first met Ms. Avison in the Spring Semester of 2022 when she enrolled in my "Federal Courts" course. This courses has the reputation, as it does at many schools, of being particularly difficult and demanding, and for the most part it commonly attracts only the school's top students. Given her general record at New York Law School and her editorial position on the school's law review, Ms. Avison obviously came within that category.

In this class context, Ms. Avison excelled. Throughout the semester she was consistently well prepared and able to respond to challenging questions about the material. Her comments were invariably thoughtful and often incisive, and her questions were consistently to the point and often probing and provocative. In the end she proved to be one of the top two students in the class. She wrote two very good papers on short writing assignments and on the final exam earned the highest grade in the class. All in all, she made a substantial contribution to the discussions and was a pleasure to have as a student.

Intellectually, Ms. Avison is a quick study who readily spots both issues and their complexities on the first go-through and, even more important, does not stop with her initial understanding. Rather, she continues to grapple with those issues and complexities and pushes herself to think her way through whatever deeper problems they present. Whenever someone in the class made an acute point or offered a perceptive comment, her face usually lit up in immediate recognition.

More generally, Ms. Avison is a most engaging and impressive young woman. From her high school years she has been a leader in a variety of projects and organizations, and she has consistently shown the admirable qualities of ambition, determination, and commitment to hard work. She is broadly inquisitive, wide-ranging in her interests, active in a variety of social and political causes, and intensely motivated in pursuing a legal career that will allow her to help others. She has already applied herself energetically to gain considerable legal experience. She worked as an assistant in a law firm for approximately two years and secured two different legal externships as well as a judicial internship in the United States District Court for the District of New Jersey. As for the future, she has told me that her greatest hope is that she will be able to obtain a year or two-year federal judicial clerkship, a goal that she has cherished since college.

In personal terms, Ms. Avison is a congenial young woman who listens carefully to others and fits in nicely in a classroom situation. While her comments and analyses are sharp, her treatment of others is never so. Rather, she responds appropriately in the context while remaining attentive, even-tempered, and respectful.

I am confident that Ms. Avison would adapt smoothly to the work load and personal requirements in any judicial chamber and that she would quickly become a highly reliable and valued law clerk. Her practical experiences working in a law firm and taking part in two externships and a judicial internship would enable her to hit the ground running.

I recommend Ms. Avison for a clerkship with Your Honor with the greatest enthusiasm and confidence.

In the event I might be able to provide any additional information, I would be more than happy to do so.

Respectfully,

Edward A. Purcell, Jr.

Joseph Solomon Distinguished Professor

Edward Purcell - edward.purcell@nyls.edu - 212-431-2856

Fable J. Avison
Fable.Avison@law.nyls.edu | (732) 610-2225 | Jersey City, NJ 07302

Writing Sample

Attached is a copy of my Case Comment that I authored in the fall semester of 2021 as a Junior Staff Editor of the *New York Law School Law Review*. My Comment has been selected for publication in Volume 67. For my Comment, I selected a case decided in the Southern District of New York in 2021, *Zurich American Life Insurance Company v. Nagel*. The case is about a former employee, who leveraged his possession of confidential company documents on his personal computers in order to coerce severance after his employment was terminated. The plaintiff brought suit under various state and federal laws, including the Defend Trade Secrets Act (DTSA), alleging that the defendant misappropriated company trade secrets when he sought severance pay in exchange for the return of the confidential information. The court considered whether the defendant had "used" trade secrets within the meaning of the DTSA and concluded that he had not because he had not opened, disclosed, or relied on them.

My Comment first contends that the court should have used the ordinary meaning of "use" and should not have restricted the applicability of the statute by "type" of use. Second, the Comment argues that the court failed to analyze the misappropriation claim under existing persuasive precedent which guides that confidentiality agreements demonstrate that secrets were acquired improperly, therefore, triggering the statute. My comment raises unique legal theories to argue against the court's decision to limit the scope of the statute. The Comment was reviewed and graded by the outgoing Executive Notes and Comments Editor. Minor edits and suggested changes have been made. The Comment has not been edited by the current Editorial Board for publication.

Zurich Am. Life Ins. Co. v. Nagel[1]

When man began to tie his fences, society as we know it began.[2] The foremost features of everyday American life,[3] like public transportation, the stock market, and technology we rely on for almost all our daily tasks have each resulted from the privatization of property.[4] The right to own property has always been considered an unalienable right, and part of the very essence of this country since its inception over two-hundred years ago.[5] The framers of the United States Constitution were notably influenced by Enlightenment and natural political philosophers like John Locke,[6] whose quintessential theory of private property stated that when man mixes his labor with an object, it becomes his property—and becomes excluded from others.[7] Over the last few centuries, American Revolutionary historians have written[8] about the similarities between the theory of "unalienable rights" in Thomas Jefferson's draft of the Declaration of Independence and Locke's theory of property.[9] It is hard to imagine society without philosopher Locke's theory of private property at the center to protect society's efforts and productivity.[10] Economist Adam Smith's foundational theory for *The Wealth of Nations* was premised on the fact that societies became more efficient as labor became specialized through privatization.[11] Specialization leads to

[1] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d. 396 (S.D.N.Y. 2021).
[2] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288–89 (Student Ed.) (Peter Laslett ed., 1988) ("[T]hat 'tis the taking any part of what is common, and removing it out of the state Nature leaves it in, which *begins the Property;* without which the Common is of no use.").
[3] *See* Thomas Jefferson, *Letter to Samuel Kercheval*, TEACHING AM. HIST. (July 12, 1816), https://teachingamericanhistory.org/document/letter-to-samuel-kercheval/ ("The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.").
[4] *See* Wolfgang Kasper, COMPETITION, https://www.econlib.org/library/Enc/Competition.html (last visited Nov. 21, 2021) ("This type of [economic] competition has inspired innumerable evolutionary steps—between the Wright brothers' first fence hopper and the latest Boeing 747, for example.").
[5] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[6] *See* Roger Pilon, *Cato Handbook for Policymakers:16. Property Rights and the Constitution*, 8 CATO INST. 173 (2017), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-16_0.pdf.
[7] *See* LOCKE, *supra* note 2, at 290–91 ("He by his Labour does, as it were, inclose it from the Common.").
[8] *E.g.*, Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 224–28 (2015) (discussing the significance of Jefferson's drafting).
[9] *See* Locke, *supra* note 7 ("Man being born…hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty, and Estate, against the Injuries and Attempts of other Men.").
[10] *See* Pilon, *supra* note 6 (commenting on the prevalence of Locke's theory in the ethics of American government).
[11] *The Wealth of Nations*, ADAM SMITH INST., https://www.adamsmith.org/the-wealth-of-nations (last visited Nov. 21, 2021) ("Another central theme is that this productive capacity rests on the division of labour and the

innovation.[12] Thus, the greatest threat to innovation, and to our society, is a loss of protection for productivity.[13] When ideas and inventions are not protected efforts are not rewarded, and a society that is not rewarded for its efforts in turn has no reason to innovate.[14] Trade secrets are a form of intellectual property, and encompass nearly all forms of business information such as strategy, plans, pricing, costs, and even corporate governance documents pertaining to the way a business is run.[15] Trade secret laws enable modern innovations by protecting intangible and invaluable information.[16] Federal laws enable citizens in every state to sue violators of trade secrets laws in federal court, to protect personal property and the American economy.[17]

In May of 2021, the Southern District of New York ("Southern District") examined a question of first impression in *Zurich American Life Insurance Co. v. Nagel*.[18] The court was asked to determine whether one "uses" a trade secret when he leverages possession of that secret against its owners as a means of extortion under the Defend Trade Secrets Act[19] (DTSA).[20] The court held that use of trade secrets to exploit the secrets' owner does not amount to a misappropriation under the DTSA and dismissed the plaintiff's DTSA claim for failure to state a claim.[21] The court reasoned that Nagel had not misappropriated trade secret information because he had not acquired the information improperly, nor had he actually used it.[22]

This case comment contends that the *Zurich* court erred when it dismissed plaintiff Zurich American Life Insurance Company's ("Zurich") DTSA claim.[23] First, the court failed to properly assess Zurich's claim of misappropriation under the DTSA when it did not consider persuasive

accumulation of capital that it makes possible. Huge efficiencies can be gained by breaking production down into many small tasks, each undertaken by specialist hands.").
[12] *See* Kasper, *supra* note 4 (commenting on the material progress that is created by competition between specialized sellers).
[13] *See Id*.
[14] *Id*.
[15] James A. Johnson, *Keeping Your Secrets Secret*, 87-AUG N.Y. St. B.J. 24, 24–25 (2015).
[16] *Id*.
[17] *See Id*.; *see also* 18 U.S.C. § 1836.
[18] Zurich Am. Life Ins. Co. v. Nagel, No. 538 F. Supp. 3d 396, 403 (S.D.N.Y. 2021).
[19] 18 U.S.C. § 1836.
[20] *Zurich Am. Life Ins. Co.*, 539 F. Supp. 3d. at 403.
[21] *Id.* at 403–06.
[22] *Id*.
[23] *Id.* at 403–06 (holding that Zurich failed to bring an actionable claim of misappropriation under the DTSA).

precedent dictating that the violation of confidentiality agreements is evidence of acquiring secrets through improper means.[24] Second, the court erred in applying an unduly restrictive definition of the word "use" from the DTSA when it did not consider the leveraging the possession of trade secrets during settlement negotiations to be a "use" under the statute.[25] Overall, the court failed to embody Congress's clear purpose and closed the door to plaintiffs seeking a remedy in federal court to defend their trade secrets from former employees and others.[26]

In 2011, Zurich hired John Nagel to work as a senior paralegal.[27] Nagel supported Zurich's attorneys and senior management with corporate governance, a role which put highly confidential information in his hands.[28] As such, Nagel signed a nondisclosure agreement (the "Agreement")[29] as part of his employment.[30]

Beginning in October of 2020, Zurich commenced an ongoing internal audit, during the course of which it discovered that Nagel had sent more than sixty confidential and proprietary documents to his personal email account between March and November of 2020.[31] The emails contained confidential information including corporate governance documents, board resolutions,

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[24] *Compare id*. (considering only Nagel's work-from-home allowance and not the terms of his employment agreement prohibiting the production of unauthorized copies), *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).

[25] *Zurich Am. Life Ins. Co.*, 539 F. Supp. 3d at 403–06.

[26] *See* H.R. REP. NO. 114-529, at 5 (2016) ("The Act defines misappropriation as acquisition of a trade secret by improper means, disclosure or use of a trade secret by a person who had reason to know that the trade secret was acquired by improper means or under circumstances giving rise to a duty of secrecy, or disclosure or use of a trade secret by a person who had reason to know it was disclosed by accident or mistake.").

[27] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 399. Nagel supported Zurich's attorneys and senior management with corporate governance matters. Defendant's Brief at 2, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter "Defendant's Brief"].

[28] Defendant's Brief, *supra* note 28.

[29] Nagel signed a document titled "Agreement Relating to Proprietary Information/Equipment/Work Development," which specified that during and after employment, Nagel would not "disclose, use for [him]self or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with me such Proprietary Information." Complaint at 5, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Complaint].; *see* Plaintiff's Exhibit A, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091).

[30] Complaint, *supra* note 30, at 4–5. The Agreement also specified that, upon his termination, Nagel was to return all documents. *Id*.

[31] Complaint, *supra* note 30, at 5. Zurich conducted an internal audit after a budget review revealed that Nagel's compensation was "significantly higher than expected." *Id*.

financial reports, and sensitive personal information about Zurich senior executives.[32]

After learning about Nagel's misconduct on November 5, 2020, Zurich immediately fired Nagel.[33] Zurich sent a demand letter to Nagel promising to take legal action unless he returned all confidential and proprietary information and consented to imaging and forensic analysis.[34] Nagel refused.[35]

Rather, Nagel threatened an age discrimination lawsuit against Zurich.[36] In response to Zurich's demand letter, Nagel's attorney spoke with counsel for Zurich in response to its demand letter and stated that Nagel would only provide the requested assurances in exchange for severance pay and the clearing of his record.[37] Zurich did not concede.[38] As a result, Nagel filed his complaint against Zurich in the New York State Supreme Court on December 29, 2020.[39] The next day, Zurich filed its four-count complaint in the Southern District of New York, alleging breach of contract and fiduciary duty, violations of the DTSA, and unjust enrichment.[40]

On March 24, 2020, Nagel responded[41] by filing a motion to strike portions of the

[32] Complaint, *supra* note 30, at 6–7.
[33] Plaintiffs' Reply Brief at 4, Zurich Am. Life Ins. Co.v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Plaintiff's Brief]; Complaint, *supra* note 30, at 7. Zurich accused Nagel of falsifying time sheets and other misconduct. *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399.
[34] Complaint, *supra* note 30, at 5 ("Zurich sent a demand letter dated November, 6, 2020, to Nagel which requested that he return all hard-copy documents containing Zurich confidential and proprietary information and submit his computer, phone, and other electronic devices, as well as his personal email accounts, for imaging and forensic analysis to ensure the return of all Zurich confidential and proprietary information.").
[35] Defendants Brief, *supra* note 28, at 3. Nagel, through his attorney Thomas Budd, contacted counsel for Zurich to confirm his receipt of the November 6 letter and declined to return the documents or to submit Nagel's devices to Zurich's inspection. Complaint, *supra* note 30, at 7.
[36] Defendant's Brief, *supra* note 28, at 10. Nagel filed a civil lawsuit in the New York Supreme Court on December 29, 2020, alleging that Zurich discriminated and retaliated against him by terminating his employment after he complained of age discrimination just three days before his 70th birthday. *Id*.
[37] Complaint, *supra* note 30, at 8; Defendants Brief, supra note 28, at 3.
[38] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 399 (S.D.N.Y. 2021); Defendant's Brief, *supra* note 28, at 4.
[39] Defendant's Brief, *supra* note 28 at 4. Nagel alleged that Zurich retaliated against him due to previous complaints of age discrimination, three days before his 70th birthday. *Id*.
[40] *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399; *see generally* Complaint, *supra* note 30 at 1.
[41] *Zurich Am. Life Ins. Co*., 538 F. Supp. 3d at 399; Defendant's Notice, *supra* note 42, at 1.

complaint[42] or, in the alternative, to dismiss all claims.[43] Nagel argued that Zurich had failed to show that he had misappropriated trade secrets and that portions of the complaint which discussed settlement negotiations should be struck.[44] On May 7, 2021, the court issued an order granting in part and dismissing in part Nagel's motion.[45] A written opinion followed on May 11, 2021,[46] dismissing Zurich's DTSA and unjust enrichment claims pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6).[47] The case continues presently, on different legal grounds.[48] On May 21, 2021, Zurich filed its amended complaint, alleging breach of contract and fiduciary duties, and fraud.[49] Nagel filed a counterclaim, accusing Zurich of tortious interference with employment,[50] defamation,[51] and age discrimination[52] under the New York State Human Rights Law, and retaliation under both the City[53] and State[54] Human Rights Laws.[55]

The DTSA was signed into law by President Barack Obama on May 11, 2016.[56] Prior to the enactment of the DTSA, state law governed trade secrets.[57] The DTSA amended the federal

[42] Nagel requested that the court strike portions of Zurich's complaint that referred to email correspondence between his attorney and counsel for Zurich pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant's Notice of Motion at 1, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Defendant's Notice]; Fed. R. Civ. P. 12(f).
[43] Nagel requested that the court dismiss all claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 399; Defendant's Notice, *supra* note 42, at 1.
[44] Defendant's Brief, *supra* note 28, at 5–6 ("Certain Paragraphs And Exhibit C To The SDNY Complaint Must Be Struck Pursuant To FRCP 12(f) Because They Contain Inadmissible Settlement Communications[.]"); *id.* at 12–17 (arguing Zurich failed to allege the existence of a trade secret with independent economic value, and that Zurich did not allege that Nagel acquired trade secrets through improper means or that Nagel used the trade secrets improperly, or that Nagel threated to use or disclose trade secrets).
[45] May 7 Order, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) (concluding that Zurich failed to properly allege that Nagel misappropriated trade secrets under the DTSA).
[46] Order Granting in Part and Denying in Part Defendant's Motion at 1, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Order]..
[47] Order, *supra* note 47, at 1. Nagel's motion was made pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* (citing Fed. R. Civ. P. 12(b)(6)).
[48] *See* Order, *supra* note 47, at 1. (dismissing plaintiff's DTSA claim).
[49] Amended Complaint, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091).
[50] Counterclaim at 41–42, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396 (S.D.N.Y. 2021) (No. 20-CV-11091) [hereinafter Counterclaim].
[51] Counterclaim, *supra* note 51, at 40–41.
[52] Counterclaim, *supra* note 51, at 36–37.
[53] Counterclaim, *supra* note 51, at 39.
[54] Counterclaim, *supra* note 51, at 40.
[55] Counterclaim, *supra* note 51, at 39.
[56] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).
[57] S. Rep. No. 114-220, at 2 (2016).

criminal code[58] to provide a private cause of action for trade secrets misappropriation claims.[59] The bill was introduced to combat the economic threat that trade secrets misappropriation posed to the U.S. economy in 2016.[60] Prior to the enactment of the DTSA, the Commissioners on Uniform State Laws[61] had already adopted the Uniform Trade Secrets Act[62] (UTSA) in 1985 in an effort to centralize trade secrets law.[63] However, Congress, aware of the inherent discrepancies in adopting and applying the UTSA state-to-state,[64] created a federal law to give trade secret owners a remedy in federal courts.[65] The DTSA protects trade secret owners from misappropriation.[66] However, as with any statute,[67] Congress did not define all the terms of the DTSA, leaving some to the interpretation of federal courts.[68]

In 1993, in *Smith v. United States*,[69] the United States Supreme Court held that trading a gun fell within the meaning of "using" a gun under 18 U.S.C.§ 924(c)(1).[70] The Court applied the plain meaning rule when it analyzed the statute.[71] The petitioner argued that "use" of a firearm

[58] 18 U.S.C. § 1836
[59] 114th Congress, 20161890, CRS Summary S.1890 (2016).
[60] S. Rep. No. 114-220, at 2 (2016) ("[T]he Commission on the Theft of American Intellectual Property estimated that annual losses to the American economy caused by trade secret theft are over $300 billion.").
[61] The Uniform Law Commission is a non-profit organization that studies, drafts, and proses uniform laws in all areas to promote uniformity across the United States. *About Us*, UNIF. L. COMM'N., https://www.uniformlaws.org/aboutulc/overview.
[62] Unif. Trade Secrets Act, 14 U.L.A. (1985). To date forty-eight out of the fifty states have adopted the UTSA. New York is not among them. *Trade Secrets Law*, UNIF. LAW COMM'N. https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Nov. 20 2021).
[63] S. Rep. No. 114-220, at 2 (2016).
[64] *Id.* at 2–3 ("Although the differences between State laws and the UTSA are generally relatively minor, they can prove case-dispositive.").
[65] The Economic Espionage Act of 1996 ("EEA") makes misappropriating trade secrets a federal crime but does not give private citizens recourse under the statute. *Id.*
[66] 18 U.S.C. § 1836.
[67] *See* LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014) ("Still, the meaning of statutory language is not always evident.").
[68] *See generally* ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019) (interpreting the required elements of misappropriation); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (holding that breach of a confidentiality agreement was an improper acquisition of trade secrets); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 451 (2d Cir. 2021) (holding that lack of employee-employer confidentiality agreement was sufficient evidence that the plaintiff failed to guard against the misappropriation of his trade secrets); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 908 (3d Cir. 2021) (determining the meaning of "use" under the DTSA).
[69] 508 U.S. 223 (1993).
[70] *Smith*, 508 U.S. at 225.
[71] *Id.* at 241.

should have been limited to firing or threatening to fire a gun.[72] Writing on behalf of the Court, Justice O'Connor proclaimed: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."[73] The Court turned the petitioner's argument on its head, concluding that construing "use" to include leveraging the gun for a drug-buy[74] and considered all of the ways to "use" a gun within the ordinary meaning of the word.[75] The Court ultimately held that leveraging a gun for illegal drugs during a drug related crime was exactly the kind of conduct the law aimed to prevent,[76] and therefore constituted a "use" under 18 U.S.C.§ 924(c)(1).[77]

In 1998, in *Bragdon v. Abbot*,[78] the United States Supreme Court used the plain meaning rulein determining that, in the Americans with Disabilities Act,[79] "disability" included HIV infections, and thereby prohibited discrimination on that basis.[80] The *Bragdon* Court relied upon a body of uniform administrative and judicial decisions,[81] holding that HIV fit within the definition of "disability" within the Act.[82] The *Bragdon* Court's holding rested in part on the importance of maintaining uniform construction of the term.[83]

The DTSA itself has also been subject to interpretation by the federal courts.[84] In 2019, in

[72] *Id.* at 230–32.
[73] *Id.* at 228 (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).
[74] *Id.* at 230–31.
[75] *Id.*
[76] *Id.* at 241 ("Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense… both create the very dangers and risks that Congress meant § 924(c)(1) to address.").
[77] *Id.*
[78] Bragdon v. Abbott, 524 U.S. 624 (1998).
[79] Americans With Disabilities Act of 1990 42 U.S.C. § 12101.
[80] *Bragdon*, 524 U.S. at 645 ("[T]he legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA.").
[81] *Id.* at 642 ("Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA.").
[82] *Id.* at 645 ("The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.").
[83] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[84] *See, e.g.* ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161 (S.D.N.Y. July 10, 2019); Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773 (E.D.N.Y. Mar. 9, 2020); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447 (2d Cir. 2021); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021); Zurich Am. Life Ins. Co. v. Nagel, No. 20-CV-11091, 2021 WL 1877364 (S.D.N.Y. May 11, 2021).

deciding *ExpertConnect, LLC v. Fowler*,[85] the Southern District recited the required elements for a misappropriation claim under the DTSA as (1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent.[86]

In 2020, in *Intertek Testing Services, N.A., Inc. v. Pennisi*,[87] the Eastern District of New York ("Eastern District") considered whether the defendants misappropriated trade secrets in violation of the DTSA when they acquired them improperly by forwarding confidential information to personal email addresses, in breach of their employment contracts.[88] The court held that defendants acquired trade secrets by improper means because they breached their duty to maintain secrecy per their agreements.[89]

That same year, in *Bramshill Investments, LLC v. Pullen*,[90] the District of New Jersey held that plaintiff sufficiently pled misappropriation under the DTSA because she referenced a company policy forbidding employees from emailing company documents to personal email accounts.[91] One year later, in *Mason v. Amtrust Financial Services Inc.*,[92] the Second Circuit Court of Appeals considered implications of confidentiality agreements.[93] The court held that the plaintiff failed to take reasonable measures to guard against misappropriation of his trade secrets because he did not require his employer to sign a confidentiality agreement when he allowed them to use his proprietary pricing model.[94]

In 2021, in *Oakwood Laboratories LLC. v. Thanoo*,[95] the Third Circuit Court of Appeals, considered whether a defendant misappropriated trade secrets by "using" his knowledge to gain employment with a competitor.[96] The court concluded that defendants do not need to specifically

[85] ExpertConnect, L.L.C. v. Fowler, 2019 WL 3004161, at *5–6.
[86] *Id.* (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[87] Intertek Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773.
[88] *Id.* at *310–25.
[89] *Id.* at *342.
[90] Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020).
[91] *Id.*
[92] Mason v. Amtrust Fin. Servs., 848 F. App'x 447 (2d Cir. 2021).
[93] *Id.* at 450.
[94] *Id.*
[95] 999 F.3d 892 (3d Cir. 2021).
[96] *Id.*

replicate or disclose information to have "used" the information in violation of the statute.[97] The court applied the ordinary meaning of the word "use" to the DTSA, holding that this was consistent with the statutory purpose.[98] Ordinary language and common dictionaries define "use" broadly and include employing something for the user's benefit.[99] Thus, the *Thanoo* court applied the plain meaning of use to the statute.[100]

In 2021, *Zurich American Life Insurance Co. v. Nagel* required the Southern District to determine whether using trade secrets for extortion constituted a "use" of trade secrets under the misappropriation standard of the DTSA.[101] Zurich argued that Nagel acquired trade secrets by improper means when he violated his employment agreement[102] by forwarding confidential information to his personal email address and accessing the information from unauthorized[103] personal devices.[104] Nagel argued that because his agreement did not explicitly forbid forwarding emails containing proprietary information,[105] Zurich had failed to allege misappropriation within the *ExpertConnect, LLC* court's definition.[106] Nagel distinguished *Bramshill Investors, LLC v. Pullen*, noting that Bramshill had a specific company policy against emailing documents to a personal account.[107]

The court concluded that Zurich failed to allege either of the required elements of a DTSA

[97] *Id.* at 908.
[98] *Id.* at 908–10 (holding that construing the word "use" narrowly failed to penalize the variety of activity which the statute intends to criminalize in order to defend fair competition practices).
[99] Use is defined as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." *Use*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[100] Oakwood Lab'ys. LLC., at 908–10.
[101] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 403–06 (S.D.N.Y. 2021).
[102] Complaint, *supra* note 30, at 4–5.
[103] Nagel's employment agreement expressly prohibited Nagel to "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with [him] such Proprietary Information." *Id.*
[104] Plaintiff's Brief, *supra* note 34, at 17.
[105] Complaint, *supra* note 30, at 5. The agreement made it prohibited conduct for Nagel to "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway [*sic*], or take with [him] such Proprietary Information. *Id.*
[106] Defendant's Brief, *supra* note 28, at 15. The *ExpertConnect, L.L.C.* court defined the elements as "(1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent." ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019) (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[107] Defendant's Brief, *supra* note 28, at 15–16 (citing Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020)).

claim.[108] First, the court determined that Zurich's pleadings did not reference specific trade secrets protected under the DTSA[109] because it failed to allege the existence of specific trade secrets with independent economic value.[110] While Zurich would have normally been afforded the opportunity to cure its defective pleadings before trial,[111] the court reasoned that the claim would still fail to allege actual or threatened misappropriation of trade secrets under the DTSA.[112] The court cited *ExpertConnect, LLC*. court's[113] reference to the DTSA's definition of misappropriation as (1) acquiring a trade secret by improper means, or (2) disclosing or using the trade secret without consent.[114] The court, though not persuaded by Nagel's specific arguments, found that Zurich failed to show that Nagel acquired the information improperly and determined that Nagel was authorized to acquire the information he possessed as part of his job while working remotely.[115]

Zurich's surviving allegation of misappropriation, that Nagel used Zurich's trade secrets as leverage during settlement negotiations before the suit commenced,[116] posed a question of first impression before the court for the purposes of the DTSA: Does one misappropriate a trade secret, when he is in possession of the trade secret and extorts the trade secret's owner, without disclosing, or necessarily even accessing, the contents of the trade secret?[117] The court's answer was no.[118] The *Zurich* court distinguished the case from *Bramshill Investments, LLC*,[119] noting the issue addressed in *Bramshill* was the defendant's actual disclosure of trade secrets rather than his

[108] 18 U.S.C. § 1836 ("An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.").
[109] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 404 (S.D.N.Y. 2021) ("These allegations are insufficiently precise to demonstrate the existence of a trade secret under the DTSA.").
[110] *Id*.
[111] *Id*. at *6.
[112] *Id*.
[113] ExpertConnect, L.L.C. v. Fowler, No. 18-CV-4828, 2019 WL 3004161, at *5–6 (S.D.N.Y. July 10, 2019).
[114] *Id*. (citing AUA Private Equity Partners, LLC v. Soto, No. 17-CV-8035, 2018 WL 1684339, at *4 (S.D.N.Y. Apr. 5, 2018)).
[115] *Zurich Am. Life. Ins. Co.*, 538 F. Supp. 3d at 405. The court based its determination on the fact that Zurich had authorized employees to work remotely as part of the COVID-19 pandemic making the sending of confidential information proper. *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] Bramshill Invs., LLC v. Pullen, No. 19-CV-18288, 2020 WL 4581827 (D.N.J. Aug. 10, 2020).

improper acquisition of the information.[120] The court did not address whether Nagel misappropriated information by acquiring it improperly, and focused solely on Nagel's alleged "use" of information.[121] The court determined that by leveraging the information during settlement, Nagel had not improperly "used" the trade secrets because he had not actually disclosed them or relied on their contents.[122] The Southern District dismissed Zurich's DTSA claim and adopted a narrow construction of the term "use" for the meaning of misappropriation in the DTSA.[123]

The *Zurich* court erred when it dismissed Zurich's DTSA claim.[124] First, the court failed to properly assess Zurich's claim of misappropriation under the DTSA when it did not consider persuasive precedent dictating that the violation of confidentiality agreements is evidence of acquiring secrets through improper means.[125] Nagel misappropriated trade secrets when he acquired the information improperly, in violation of his employment agreement.[126] Confidentiality agreements are evidence that an employer is bound to secrecy, and breach of a confidentiality agreement demonstrates that an employee violated their duty to maintain secrecy, thereby acquiring the trade secrets by improper means.[127]

In 2020, in *Intertek Testing Services, N.A., Inc.*, the Eastern District held that defendants misappropriated trade secrets under the DTSA, when they acquired them improperly.[128] The court

[120] *Id.*
[121] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 405.
[122] *Id.* (considering whether Nagel's offer to exchange possession of the confidential and proprietary information in exchange for consideration during settlement constituted an improper "use" of the information).
[123] *Id.* at 404–06.
[124] *Id.* at 403–06 (holding that Zurich failed to bring an actionable claim of misappropriation under the DTSA.).
[125] *Compare Zurich Am. Life Ins. Co*, 538 F. Supp. 3d at 403–06, *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).
[126] Complaint, *supra* note 30, at 4–5.
[127] *See Mason*, 848 F. App'x at 450 (holding that plaintiff did not take reasonable steps to protect his trade secrets because he did not ask his employer to sign a confidentiality agreement when he agreed to their use of his proprietary pricing model); *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *340–42 (holding that plaintiff introduced sufficient evidence indicating that defendants misappropriated trade secrets by acquiring the information in plain violation of their employment agreements).
[128] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773.at *340–42.

considered whether ex-employees of a construction company had violated the DTSA when they breached their employment contracts by forwarding confidential information to their personal email addresses after they had each tendered their resignation to the company.[129] The court concluded the plaintiff had submitted sufficient evidence that defendants obtained the trade secrets through improper means under the DTSA.[130] Specifically, the court pointed to the defendants' employment contracts and confidentiality agreements which imposed a duty to maintain secrecy and delete any confidential files on their personal computers after the end of their employment.[131] The *Intertek Testing Services LLC* court held that the conduct violated the DTSA because the statute defined improper means[132] "to include breach of a duty to maintain secrecy."[133] Therefore, trade secrets were acquired through improper means because the defendant was bound by a confidentiality agreement and breached that agreement.[134]

In 2021, in *Mason*, the Second Circuit affirmed a New York district court's dismissal of a plaintiff's' DTSA claim because he failed to properly allege misappropriation.[135] In *Mason*, the court evaluated a plaintiff's claim against a former employer for misappropriating trade secrets under the DTSA.[136] Plaintiff was a senior vice president of defendant and was the creator of a special pricing model used by the defendant for its insurance business.[137] The court affirmed the district court's order to dismiss the plaintiff's DTSA claims because the plaintiff did not meet the elemental requirement to take reasonable measures to protect his trade secrets and information.[138] The court pointed to plaintiff's failure to require defendant to sign a nondisclosure agreement[139]

[129] *Id.* at *310–25.
[130] *Id.* at *332–33;18 U.S.C. § 1839(6)(A).
[131] *Id.* at *342. Defendants were subject to agreements which bound them to "Maintain[ing] secrecy; erasing the information on their company laptops before returning them to plaintiff; commencing employment with plaintiff's competitor shortly after leaving their employment with plaintiff; and using the trade secrets and confidential information for purposes unrelated to their employment at Intertek, without plaintiff's consent." *Id.*
[132] 18 U.S.C. § 1839(6)(A).
[133] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342.
[134] *Id.* ("[P]laintiff proffered sufficient evidence to show that defendants obtained its trade secrets and information through "improper means[,]" which specifically includes, inter alia, 'breach of a duty to maintain secrecy.'").
[135] Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447 (2d Cir. 2021).
[136] *Id.*
[137] *Id.* at 448–49.
[138] *Id.* at 450.
[139] *Id.*

or to require an agreement that the defendant's use of plaintiff's pricing model was conditioned on his employment with the defendant.[140] Thus, the court held that Amtrust did not misappropriate plaintiff's trade secrets under the DTSA because there was no agreement as to the information's confidentiality.[141]

Both *Mason* and *Intertek* demonstrate the importance of considering the record when making determinations about the validity of a misappropriation claim.[142] Both cases provided this court with analogous rulings[143] that confidentiality agreements serve as a basis for determining whether trade secrets have been misappropriated as a matter of law.[144] Unlike the employer in *Mason*, which did not agree to confidentiality of the pricing model in dispute, Nagel agreed to confidentiality in his employment agreement.[145] Specifically, Nagel agreed that he would not "disclose, use for [him]self or others, make unauthorized copies of, alter or modify in any way, or take with [him] such Proprietary Information."[146]

Like Nagel, *Intertek* defendants were long time employees[147] who violated their employment contracts by sending confidential information to personal email addresses.[148] The

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[140] *Id*.
[141] *Id*.
[142] *Compare id*. at 448–49 (holding that the failure of the plaintiff to legally protect his secrets eliminated a claim for improper acquisition of those secrets.), *with* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (holding that the defendant's breach of a confidentiality agreement was sufficient evidence to support an improper acquisition DTSA claim alone).
[143] *Mason* is a summary order of the Second Circuit and does not carry precedential value. *Mason*, 848 F. App'x 447 (2d Cir. 2021). *Intertek Testing Servs.* is not binding authority on the Southern district, but is persuasive precedent the court should have considered given the similarities between the cases. *Compare Intertek Testing Servs. N.A. Inc.*, 2020 WL 1129773, at *342 (E.D.N.Y. Mar. 9, 2020) (determining whether a confidentiality agreement was sufficient evidence to support an improper acquisition DTSA claim alone), *with* Zurich Am. Life Ins. Co., v. Nagle, 538 F. Supp. 396 (S.D.N.Y 2021) (analyzing whether a former employee, bound by a confidentiality a greement, who transferred of confidential company information misappropriated trade secrets under the DTSA).
[144] *Id*. at 448–49 (holding that the failure of the plaintiff to legally protect his secrets eliminated a claim for improper acquisition of those secrets.); Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (concluding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).
[145] *Compare*, *Mason*, 848 F. App'x. at 450 (noting that the plaintiff did not protect his proprietary pricing model with any legal agreements or licensing), *with* Complaint, *supra* note 30, at 17 (forbidding Nagel from making copies of any of the confidential information he had access to).
[146] Complaint, *supra* note 30, at 17.
[147] *Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *310–18. One defendant began working for Intertek in 1983 and tendered his resignation in 2019. *Id*.
[148] *Compare* Complaint, supra note 30, at 5, *with* Plaintiff's Exhibit A, Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 399 (S.D.N.Y. 2021) (forbidding Nagel from making copies of confidential materials), *with* Intertek

Intertek court relied upon the statutory text when it determined the validity of the DTSA claims.[149] Improper means, as stated in *Intertek*, includes theft and a breach of a duty to maintain secrecy.[150] Nagel's conduct was improper because he violated his Agreement and therefore breached his duty to maintain secrecy.[151] Nagel sent copies of confidential information to his personal email, the equivalent of copying physical documents and transporting them to his home.[152]

The Southern District gave no weight to Nagel's employment agreement with Zurich and failed to provide any analysis of the DTSA to explain why Nagel's conduct did not amount to acquiring the information by "improper means."[153] The court erred by failing to consider persuasive precedent from *Intertek* and *Mason*.[154] Had the court relied on such precedent, it would have considered Nagel's employment agreement with Zurich as evidence that Nagel was forbidden from making copies of confidential information and therefore acquired the trade secrets improperly.[155]

Second, the court erred in applying an unduly restrictive definition of the word "use" in the DTSA when it did not consider leveraging the possession of trade secrets during settlement negotiations as a "use" under the statute.[156] Binding precedent dictates using a broad construction

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Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773, at *342 (concluding that defendants were subject to confidentiality agreements which forbid sending confidential information to a personal email address)..

[149] Intertek Testing Servs., N.A., Inc. v. Pennisi, 2020 WL 1129773, at *342.

[150] *Id.* (citing 18 U.S.C. § 1839(6)(A)).

[151] Nagel's agreement provided that he must not: "disclose, use for [himself] or others, make unauthorized copies of, alter or modify in anyway, or take with [him] such Proprietary Information." Complaint, *supra* note 30, at 5.

[152] *Id.*

[153] Zurich Am. Life Ins. Co. v. Nagel, 538 F. Supp. 3d 396, 404–06 (S.D.N.Y. 2021).

[154] *See Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342 (holding that evidence of breach of a confidentiality agreement was sufficient to indicate that defendant acquired trade secrets through improper means); Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that plaintiff failed to properly protect his trade secrets via a confidentiality agreement and implying the importance of an agreement when evaluating misappropriation claims under the DTSA).

[155] *Compare Intertek Testing Servs., N.A., Inc.*, 2020 WL 1129773, at *342 (holding that evidence of breach of a confidentiality agreement was sufficient to indicate that defendant acquired trade secrets through improper means), *and* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x at 450 (holding that plaintiff failed to properly protect his trade secrets via a confidentiality agreement and implying the importance of an agreement when evaluating misappropriation claims under the DTSA), *with Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 405 ("If Zurich means to argue that Nagel improperly "used" trade secrets by emailing documents to himself, that argument does not plausibly state a claim.").

[156] *Compare* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."), *with Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d 396, 404–06 (holding that leveraging possession of trade secrets does not constitute a use)..

of a word to give it its plain meaning.[157] Terms that are not defined at statute should be construed in line with their plain meaning and remain consistent with their construction in other statutes of the same kind.[158]

The plain meaning rule was famously applied in *Smith v. United States*,[159] in 1993, by the United States Supreme Court when it considered the term "use" under 18 U.S.C.§ 924(c)(1), which applied special penalties to any defendant who "during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm."[160] The Court analogized the defendant's "use" of a gun to the "use" of a cane during the famous "caning" of Senator Sumner in 1856.[161] The Court determined that when a statute's purpose is best captured with the ordinary meaning of a term, the ordinary meaning should apply.[162] The Court concluded that the intention of the statute was to prevent violence arising when guns are included in drug trafficking schemes and that that purpose was best furthered by applying a broad construction of the word "use".[163]

The Supreme Court again applied the plain meaning rule when it was asked to interpret the word "disability" under the Americans with Disabilities Act in *Bragdon v. Abbot* in 1998.[164] In *Bragdon*, the Court applied plain meaning to the word "disability" to construe to include patients infected with HIV and thereby prohibited discrimination on that basis.[165] The Court relied upon a body of uniform administrative and judicial decisions holding that HIV fit within the definition of "disability" under the Act.[166] The *Bragdon* Court's holding rested in part on the significance of

[157] *Zurich Am. Life Ins. Co.*, 538 F. Supp. 3d at 403–06.
[158] *See Smith*, 508 U.S. at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); *see also* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892, 910 (3d Cir. 2021) ("In accordance with its ordinary meaning and within the context of the DTSA, the "use" of a trade secret encompasses all the ways one can take advantage of trade secret information to obtain an economic benefit, competitive advantage, or other commercial value, or to accomplish a similar exploitative purpose...").
[159] *Smith*, 508 U.S. 223 (1993).
[160] *Id.* at 227.
[161] *Id.* at 230–31.
[162] *Id.* at 238–41.
[163] *Id.* at 240.
[164] Bragdon v. Abbott, 524 U.S. 624, 645 (1998).
[165] *Bragdon*, 524 U.S. at 645 ("[T]he legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA.").
[166] *Id.* ("The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.").

maintaining uniform construction of the term to promote consistency.[167] *Smith* and *Bragdon*, taken together, instruct lower courts to consider both the judicial landscape[168] and the congressional record[169] to afford the statute both its intended purpose and a consistent interpretation throughout the courts.[170]

While the Second Circuit has yet to officially define "use" within the DTSA, other jurisdictions have applied the plain meaning rule to the Act.[171] In 2017, in *Oakwood Laboratories LLC v. Thanoo*, the Third Circuit reversed a New Jersey district court's erroneous dismissal of plaintiff's trade secret claim.[172] The case was filed in response to an ex-employee's possession of confidential and proprietary information while working for a competitor.[173] Plaintiff Oakwood Laboratories LLC ("Oakwood") hired defendant Dr. Thanoo as its senior scientist.[174] As Oakwood's senior scientist, Thanoo directly designed the trade secrets[175] that were the basis of the litigation itself.[176] The district court, however, dismissed Oakwood's DTSA claims, holding that Oakwood failed to allege that the trade secrets were actually "used."[177] On appeal, the Third Circuit rejected the district court's interpretation of the word "use" for three reasons: 1) it was contrary to the ordinary meaning of the word; 2) it was contrary to the text of the DTSA; and 3) it was "contrary to the broad meaning that courts have attributed to the term 'use' under the state laws that address trade secret misappropriation."[178] The court pointed to the construction of "use" within

[167] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[168] *Id.* at 631, 645 (noting that no court or agency had construed the meaning of disability within the Rehabilitation Act as not inclusive of HIV, and that Congress had all but taken the definition of disability verbatim from the Rehabilitation Act).
[169] *Id.* at 645 ("All indications are that Congress was well aware of the position taken by OLC when enacting the ADA and intended to give that position its active endorsement.").
[170] *Id.* ("We find the uniformity of the ... judicial precedent construing the definition significant.").
[171] *See* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021) (applying the plain meaning of "use").
[172] *Id.*
[173] *Id.* at 896–898.
[174] *Id.* at 896.
[175] *Id.*
[176] *Id.* at 897–898. Thanoo went on to work with direct competitor and previous potential venture partner, Aurobindo. *Id.* Aurobindo hired Thanoo in April 2014, and "[w]ithin months" of hiring Thanoo, Aurobindo formed their own group based in the US with the specific purpose of developing microsphere technology. *Id.*
[177] *Id.* at 908 (defining use as to employ for the accomplishment of a purpose or to benefit from).
[178] *Id.* The district court defined use of trade secrets only to mean their replication. *Id.* The Third Circuit criticized this narrow definition because it restricted a defendant's actions to those only involving creating something with the information. *Id.*

the UTSA, a model act adopted by the Commission on Uniform State Laws,[179] and which over forty-eight states[180] have based similar state law provisions.[181]

The Supreme Court's holdings in *Smith* and *Bragdon* dictated the Third Circuit's holding in *Thanoo*, applying a broad construction of the word "use" consistent with its ordinary meaning, the text of the DTSA as enacted by Congress, and the meaning that courts have assigned to similar trade secret laws.[182] Zurich properly alleged that Nagel maintained possession of trade secrets acquired improperly, in violation of his Agreement, and that Nagel used that information as leverage during settlement negotiations with Zurich which caused injury, just as divulging that information to another would have caused.[183] If the court had applied the ordinary meaning of the term "use"[184] to the DTSA, it would have denied Nagel's motion to dismiss Zurich's DTSA claim because Nagel had employed the information for his benefit.[185] Taking possession of trade secrets and using that possession in an attempt to extort Zurich falls squarely within the ordinary meaning of the word "use."[186]

The interpretation of "use" from *Thanoo* supports a similarly broad construction of the term "use" under the DTSA consistent with the plain meaning of the word.[187] By applying a narrow definition of "use" that only includes actions such as relying upon the contents or revealing the

[179] Unif. Trade Secrets Act, 14 U.L.A. (1985); *see* Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909 (reasoning that the definitions of misappropriation under the DTSA and the Uniform Trade Secrets Act use the term "use" almost identically).
[180] *Trade Secrets Law*, UNIF. L. COMM'N., https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Nov. 20, 2021).
[181] Congress was aware of the UTSA and its progeny when it enacted the DTSA. Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909; H.R. Rep. No. 114–529 at 199 (2016).
[182] *See* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d at 909 ("Numerous cases, pre-dating the DTSA, demonstrate that understanding of the term [use].").
[183] Complaint, *supra* note 30, at 7.
[184] *Use*, Black's Law Dictionary (11th ed. 2019).
[185] Complaint, *supra* note 30, at 6–7; Plaintiffs' Brief, supra note 37, at 4.
[186] *Compare use*, Black's Law Dictionary (11th ed. 2019), *with* Zurich Am. Life. Ins. Co., v. Nagle, 538 F. Supp. 3d 396, 405 (holding that one does not misappropriate trade secrets for the purpose of the DTSA when one "uses possession of the trade secret to extort the trade secret's owner, without disclosing," relying upon, or opening the contents of the secrets).
[187] Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021).

information, the Southern District obstructed the intended purpose and effects of the DTSA[188] and failed to adhere to the Supreme Court's clear precedent instructing lower courts to construe statutory terms in line with their plain meaning when they have not been defined at statute.[189] Defining "use" in line with its plain meaning achieves judicial uniformity, and the statutory purpose will not be frustrated.[190] The DTSA was enacted to protect Americans against all injuries that trade secret owners face when they lose exclusive ownership of their information.[191]

In conclusion, the Southern District erred when it failed to properly assess Zurich's claim of misappropriation under the DTSA by not considering persuasive precedent dictating that violation of confidentiality agreements is evidence of acquiring trade secrets through improper means under the DTSA and by construing the term "use" narrowly.[192]

The DTSA was enacted by Congress in 2016 to protect innovators against theft of their most trusted assets, their efforts and their productivity—their trade secrets.[193] The Southern District's decision effectively denies relief to thousands of potential plaintiffs by applying the DTSA narrowly and excluding a host of other injurious conduct.[194] By failing to apply the DTSA broadly, the Southern District failed to protect one of the most foundational rights of modern American society—private property.[195]

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[188] S. Rep. No. 114-220, at 2 (2016). Congress enacted the DTSA to combat the economic threat that trade secret theft posed the United States economy in 2016. *Id*.

[189] *See* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("[T]he new statute should be construed in light of this unwavering line of administrative and judicial interpretation."); Oakwood Lab'ys LLC v. Thanoo, 999 F.3d 892 (3d Cir. 2021) (holding that the term "use" should be construed plainly because in the context of trade secrets, numerous other courts have defined it broadly).

[190] *Id*.

[191] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).

[192] *Compare* Zurich Am. Life Ins. Co. v. Nagel, No. 20-CV-11091(JSR), 2021 WL 1877364 (S.D.N.Y. May 11, 2021), *with* Mason v. Amtrust Fin. Servs., Inc., 848 F. App'x 447, 450 (2d Cir. 2021) (holding that when a plaintiff does not protect their secrets with a duty to maintain secrecy, there is no plausible misappropriation), *and* Intertek Testing Servs., N.A., Inc. v. Pennisi, No. 19-CV-7103, 2020 WL 1129773, at *340–42 (E.D.N.Y. Mar. 9, 2020) (holding that evidence of a breach of a confidentiality agreement was evidence of misappropriation of trade secrets).

[193] Remarks on Signing the Defend Trade Secrets Act 2016, Daily Comp. Pres. Doc. 309 (May 11, 2016).

[194] *See Zurich Am. Life. Ins. Co.*, 538 F. Supp. 3d at 403–06 (holding that Nagel's conduct did not constitute a "use" under the DTSA because Nagel did not rely on the contents or disclosure trade secrets); Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

[195] *See* Jefferson, *supra* note 3 ("The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.").

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Writing Sample II

Attached are the sections (factual summary, argument, conclusion) of an appellate brief that I submitted for consideration in the Dean Jerome Prince Memorial Moot Court Competition. The fact pattern instructed competitors to argue on behalf of either Petitioner or Respondent, on the issues of (1) whether the Petitioner's Sixth Amendment right to counsel attached prior to his recorded conversation with an undercover FBI agent; and (2) whether the district court properly excluded testimony taken at a grand jury proceeding pursuant to rules 802 and 804(b)(1) of the Federal Rules of Evidence.

This brief was submitted on behalf of Respondent, The United States of America, in which I argued that the right to counsel attaches only in the five instances delineated by the Supreme Court in *Kirby v. Illinois*. Next, I argued that the grand jury testimony was properly excluded hearsay because the Government lacked the requisite motive pursuant to Rule 804(b)(1).

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I. FACTUAL SUMMARY

In September 2020, the Government received a tip from the Internal Revenue Service ("IRS") that Thomas Collins ("Defendant") was potentially operating an illegal business from his legally operated restaurant and bar, Hoyt's Tavern. R. at 43–44. Over the next several months, the Government began its investigation of the Defendant and Hoyt's Tavern. R. at 44–45. The initial period of this investigation revealed that Roxanne Roulette ("Roxy Roulette"), a longtime friend and neighbor of the Defendant, had rented the basement of Hoyt's Tavern where she and the Defendant ran an illegal sports gambling operation. R. at 44. The Defendant then laundered the proceeds of the gambling operation through Gourmet Grocers, a supposed "vendor" of the restaurant. R. at 44. That company then made payments to the Defendant and his associates including Roxy Roulette. R. at 44–45. While during 2020 the Government had pieced together a credible story, it lacked sufficient evidence to prosecute the Defendant.

In December 2021, the Government was notified that an associate of the Defendant, Pavel Hoag-Fordjour, was in Boerem. R. at 45. Later, on January 5, 2021, the Government stopped Mr. Hoag-Fordjour before leaving the jurisdiction to serve him with a material witness warrant pursuant to 18 U.S.C. § 3144. R. at 45. The Government deposed Mr. Hoag-Fordjour and held him in custody before he was later released and retreated to Brooklania—a country with which the United States lacks an extradition agreement. R. at 45–46. Soon after, numerous other associates of the Defendant began returning to Brooklania, foreclosing several avenues of investigation, and accelerating the Government's investigation of the Defendant. R. at 45.

To that end, the Government mailed the Defendant target letters notifying him of the investigation of him and his business. R. at 45. On January 25, 2021, the Government arrested Roxy Roulette to prevent her from fleeing the jurisdiction to Brooklania. R. at 44–46. Despite the Government's objections, Roulette was released on bail and thereafter returned to Brooklania. R. at 46.

On January 26, 2021, the Government spoke with the Defendant about the ongoing FBI investigation when Special Agents Sayed and Simonson visited him at home. R. at 6. The Defendant subsequently consented to a cursory search of his apartment by the agents. R. at 6. The agents visually inspected each of the rooms in the Defendant's apartment. Special Agent Sayed observed a key fob bearing the same logo as the Defendant's apartment complex on the top of a dresser in one of the bedrooms. R. at 6. When Special Agent Sayed asked the Defendant if the keys were for a storage unit, the Defendant told the agents that the keys were used for a storage unit at a vacation home located in Colorado. R. at 6. Special Agent Sayed informed the Defendant that he would hold on to the keys and the Defendant acquiesced. R. at 7. Special Agent Simonson urged the Defendant to cooperate with the Government's investigation of other suspects. R. at 6–7. Simonson was unsuccessful. R. at 7. Special Agent Sayed then brought the keys to the lobby where he inquired about a storage facility. R. at 7. Special Agent Sayed was taken to the storage room where he observed a series of storage lockers. R. at 7. After noticing a storage locker poorly camouflaged with newspaper, Special Agent Sayed inserted the key without opening the door, confirming the locker corresponded with the Defendant's key. R. at 7.

Later that day, feeling confident after his interaction with the Defendant and identification of the Defendant's storage unit, Special Agent Simonson suggested obtaining an arrest warrant for the Defendant by leaving a post-it note for Special Agent Sayed. R. at 8. However, the Government held off in favor of investigating the Defendant while undercover to ensure that the investigation resulted in the arrest of the correct individual. R. The Government's continued investigation of the Defendant was in search of direct evidence to bolster the circumstantial evidence obtained until that point in the investigation.

The agents subsequently obtained a search warrant that was executed on the morning of January 27, 2021, for the Defendant's residence, including his storage locker. R. at 56. The Government's search revealed a thumb drive containing records of the gambling operation and $2.5 million stored in a duffle bag. R. at 56. Later that day, in furtherance of their investigation,

the Government sent Special Agent Ronald Ristroph, wearing an electronic listening device, to Hoyt's Tavern to speak with the Defendant. R. at 15. Special Agent Ristroph—under the pseudonym of Brett Thompson—represented that he was an associate of Roxy Roulette and engaged the Defendant in a brief conversation about the restaurant and its relationship with Gourmet Grocers. R. at 16.

On February 22, 2021, an employee of the Defendant, Lucy Washington, gave her testimony before a federal grand jury empaneled in the Eastern District of Boerum. R. at 21. Ms. Washington appeared without immunity, exposing her to criminal prosecution for any self-incriminating statements. R. at 22. During direct examination, Ms. Washington described her employment for the Defendant as a bartender at Hoyt's Tavern as well as her involvement in the aforementioned gambling operation. R. at 22–27. Ms. Washington insisted that the Defendant had no knowledge of any crimes taking place in the tavern, despite her employment for the Defendant in the same location where the gambling ring was taking place and the Defendant's longtime relationship with Roxy Roulette. R. at 22–27. When asked if she was aware that lying to a grand jury constituted perjury, Ms. Washington volunteered that she "did not know it was a crime," but stated that her testimony was truthful. R. at 27.

Despite Ms. Washington's spirited testimony, the grand jury returned an indictment charging the Defendant with one count of Illegal Gambling in violation of 18 U.S.C. § 1955 and Boerum Penal Code § 68.01 and one count of Laundering of Monetary Instruments ("Money Laundering") in violation of 18 U.S.C. § 1956. R. at 1–2.

Lucy Washington was tragically killed in a bicycle accident on June 21, 2021. R. at 10. Therefore, neither the Government nor the Defendant was able to call Ms. Washington to testify at the trial which took place in September of the same year. R. at 42.

ARGUMENT

II. DEFENDANT'S CONVERSATION WITH UNDERCOVER SPECIAL AGENT RISTROPH IS ADMISSIBLE EVIDENCE BECAUSE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT IS ONLY TRIGGERED ONCE FORMAL CRIMINAL PROSECUTION IS INITIATED AGAINST THE DEFENDANT.

This Court should affirm the decision of the Fourteenth Circuit holding that the Defendant's Sixth Amendment right to counsel did not attach when he spoke with Special Agent Ristroph at Hoyt's Tavern; therefore, Defendant's statements were admissible at trial. The Sixth Amendment guarantees criminal defendants the right to counsel against charges brought by federal and state law enforcement. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel for the accused can be traced to the English common law tradition of affording defendants accused of misdemeanor crimes counsel to argue the law on their behalf at trial. In *Kirby v. Illinois*, the Court has made clear that the Sixth Amendment is only triggered upon the formal initiation of criminal proceedings and has never found mere police investigation sufficient. 406 U.S. 682 (1972) (declining to include routine police investigation such as a line-up that occurs prior to the indictment as an instance that triggers the Sixth Amendment protections); *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that the Sixth Amendment is not triggered by police investigation). The Sixth Amendment does not guarantee the right to legal advice nor has this Court ever insinuated that it should.

Despite this Court's consistent interpretation and refusal to dilute the purpose and text of the Sixth Amendment, the Third and Seventh Circuits continue to stretch the right to counsel beyond its purpose and text. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (holding that the defendant's right to counsel attached prior to his indictment when he was "confronted with the organized resources of an ongoing police investigation."); *United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cit. 1986). The Second and Sixth Circuits have adopted the bright line rule under *Kirby* and have held that the right to counsel under the Sixth Amendment is only triggered upon the initiation of one of the five events described by the Court in *Kirby*. *See*

United States v. Moody 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000); *United States v. Mapp*, 170 F.3d 328, 333–34 (2d Cir. 1999) (holding that recorded conversations that take place while in police custody for a different criminal transaction did not trigger Sixth Amendment right to counsel).

Here, the Court should apply the bright line rule established in *Kirby* and applied by the Second and Sixth Circuits. Those Circuits acknowledge that the Court has spoken as to the moment the Sixth Amendment right to counsel attaches. The list produced by the *Kirby* Court was not a mere example; but rather, a definite list of the five events in criminal procedure which bring the defendant eye-to-eye with the power of the State. The Sixth Amendment is not an ever-expandable shield for defendants to evade law enforcement. The bright line established in *Kirby* should be upheld to prevent the distortion of the Constitution's promises beyond recognition.

A. Recorded Conversations Between the Government and the Defendant are Admissible if the Communication Took Place Prior to the Initiation of Formal Criminal Proceedings.

Recorded conversations with undercover law enforcement that take place prior to the Government's initiation of a formal prosecution of the Defendant do not trigger the Sixth Amendment right to counsel. *Kirby*, 406 U.S. 682; *Moody*, 206 F.3d 609 (holding that pre-indictment plea negotiations do not trigger the Sixth Amendment right to counsel because the critical states of criminal proceedings begin "only after the initiation of formal judicial proceedings."). The Court has also been clear that government actions that are argued to have the effect of "sealing the defendant's fate," such as confessions to police for crimes not yet charged, do not trigger the Sixth Amendment. *See Moody*, 206 F.3d 609 (citing *Moran v. Burbine*, 475 U.S. 412, 430 (1986)).

In *Kirby*, this Court forged a clear path through its precedents that attempted to define the moment of attachment and declared that a defendant's right to the assistance of counsel attaches after the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. 682, 689 (1972) ("It is

then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."). The *Kirby* Court concluded that formal charges, information, and arraignments all rise to the level of "adversary judicial criminal proceedings" because through those actions the defendant is actually "faced with the prosecutorial forces of organized society…" and the positions of the parties become "solidified." *Id.*; *see United States v. Gouveia*, 467 U.S. 180, 189 (1984). *Kirby* established a bright line rule for determining when the Sixth Amendment right to counsel attaches has since been applied in subsequent cases by this Court. *See Moran*, 475 U.S. 412. Rather than thrusting a fact-intensive inquiry upon the lower courts, this Court should affirm the *Kirby* Court's holding that the Sixth Amendment right to counsel is triggered only when the defendant becomes the accused by way of formal criminal proceedings.

The Second and Sixth Circuits make clear that the threshold question of whether the Sixth Amendment is triggered is not whether the Defendant's proof of guilt is at stake, but rather, whether the Government's action cause a confrontation between the Defendant and a concentration of prosecutorial resources and intricacies of criminal procedure. *Compare United States v. Moody* 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000), *and United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), *with Kirby v. Illinois* 406 U.S. 682 (1972).

In *United States v. Mapp*, the Second Circuit Court of Appeals held that the defendant's right to counsel under the Sixth Amendment was not triggered when, six months prior to his indictment for the crime at issue, he was brought to the Eastern District of New York for fingerprinting and intentionally placed in a holding cell with a cooperating witness who was wearing an electronic listening device. 170 F.3d 328, 333–34 (2d Cir. 1999). The Court of Appeals reasoned that absent the formal initiation of prosecution for the crime at issue, the recorded conversation between the defendant and the cooperating witness was admissible evidence. *Id.* at 334.

The Government's actions did not trigger the Defendant's Sixth Amendment right to counsel because it did not initiate formal criminal proceedings against the Defendant when Special Agent

Ristroph spoke with him in Hoyt's Tavern. The Government was engaged in the preliminary investigation of the Defendant and had not sought or received an indictment, formal charge, information, or arraignment of the Defendant. *See Kirby*, 405 U.S. 689 (holding that the Sixth Amendment right to counsel is only triggered upon the initiation of formal criminal proceedings which include indictment, formal charge, information, or arraignment). Rather, the Government gathered evidence during the exchange with Defendant that was used to determine whether or not to formally prosecute the Defendant.

The Defendant was not faced with the requisite "prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" because the Government's position was not definitively adverse. *Kirby*, 406 U.S. 689. The Government's method of questioning or subjective motivation for questioning the Defendant is immaterial to this Court's inquiry. The record is unambiguous that the Defendant was indicted and formally charged after his conversation with Special Agent Ristroph. Therefore, this Court should affirm the decision of the Fourteenth Circuit and this Court's decision in *Kirby*.

B. The Third and Seventh Circuit's Fact-Intensive Inquiry Departs from Established Precedent and Thwarts the Text and Purpose of the Sixth Amendment Right to Counsel.

The only controlling authority before this Court is *Kirby* and its progeny. The *Kirby* Court rejected the defendant's invitation to carve out a per se exclusionary rule for testimony given during an identification prior to his indictment, underscoring the importance of initiating criminal proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The Third and Seventh Circuit's version of *Kirby* turns the Court's holding on its head—mistaking the *Kirby* Court's conclusion that upon "formal charge, preliminary hearing, indictment, information, and arraignment" the defendant "faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" to mean that whenever the defendant is faced with prosecutorial forces, he is entitled the right to counsel under the Sixth Amendment. *Compare Id.* at 689, *with United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986), *and Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999). This resolution of the Amendment is

repugnant to the text of the Constitution itself and contradicts the only controlling precedent before this Court. *Compare Kirby*, 406 U.S. at 689, *with Matteo*, 171 F.3d 877. The requirement that the defendant is merely faced with prosecutorial forces or criminal procedure transforms the function of the Sixth Amendment from a right to counsel to create a defense to a right to counsel for legal advice.

The right to counsel standard enunciated by this Court is grounded in both the text and purpose of the Sixth Amendment. The *Gouveia* Court concluded that the words "criminal prosecution" and "accused" as they appear in the Sixth Amendment, and the purpose of the right to counsel which is "assure aid at trial 'where the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" 467 U.S. 180, 189 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)).

The text of the Sixth Amendment makes it explicit that the right to counsel is not without limitation. *See* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for his defense."). The Third and Seventh Circuits expand the right to counsel beyond the clear limits of the text by finding attachment prior to the initiation of formal criminal proceedings and before the position of the prosecution becomes firm. *See United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (finding that the defendant's right to counsel attached prior to this indictment but after a preliminary arraignment). The Sixth Amendment was enacted to serve as a sword for the accused who stood to lose their life or liberty and not to provide counsel to those who are subject to investigation.

i. A bright line rule preserves judicial resources and does not invade the accused's constitutional right to counsel to put on a defense when confronted by actual criminal proceedings.

The Court's bright line rule effectuates clear judicial decision-making and eliminates the need for an ad hoc determination of each defendant's particular circumstances to determine

whether his Sixth Amendment right to counsel was triggered or not. *See United States v. Gouveia*, 467 U.S. 180, 193 (1984) (holding that the Court has "foreclosed the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceeding."); *see also United States v. Moody*, 206 F.3d 609 (6th Cir. 2000), *cert denied*, 531 U.S. 925 (2000) ("The Supreme Court and this Circuit have reduced the right to counsel to a bright line test; the Supreme Court has identified with particularity the states of a criminal proceeding which are 'critical' and thus implicate the right to counsel."). The result contemplated by the Third and Seventh Circuits asks the judiciary to closely examine the organization and resources that law enforcement relies on to investigate potential suspects. This will crowd overburdened lower courts who will be asked to make case-by-case determinations about the defendant's Sixth Amendment rights at any point during the government's investigation. This is a sharp departure from the current standard which requires determining if one of the five specified milestones has occurred and has the potential to chill legitimate police work when it is unclear if a sufficient amount of resources have been expended on a suspect. Absent objective criteria, judges will remain unclear about applying Sixth Amendment doctrine.

The bright line rule established in *Kirby* states that the right to counsel attaches at the moment when the government actually initiates formal criminal proceedings against the defendant which requires an attorney to explain the legal issues before him. In *Gouveia*, the Court held that when the government obtains an indictment, formal charge, information, or arraignment of or against the defendant, "the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified." 467 U.S. 180, 189 (1984).

Kirby reflects the importance of drawing a sharp line between police investigation and prosecution. The standard does not engage in a fact-intensive review of the federal or state investigation but rather asks if the Government has solidified its position as adverse to the defendant.

C. Even if this Court Should Find that the Third Circuit's Alteration of Kirby is the Appropriate Standard, this Court Should Still Find that the Government's Actions Do Not Meet the Circuit's Fact Intensive Inquiry because the Government was Still Engaged in an Investigation.

If this Court should find the Third Circuit's version of the *Kirby* rule persuasive, this Court should still find that defendant's conversation with Special Agent Ristroph did not constitute the moment in time in which the defendant found "himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law" *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999).

Under the Third Circuit's version of *Kirby*, the right to counsel may attach during a police investigation when the government is aware that the defendant is represented. *See Id.* at 893. In *Matteo*, the Third Circuit held that the defendant's right to counsel attached when he had two recorded telephone conversations with government agents. *Id.* at 892. At the time of the defendant's recorded conversation with law enforcement, the government had arrested and incarcerated the defendant for over a week and had been subject to a preliminary arraignment. *Id.* at 892–93. Importantly, law enforcement was aware that the defendant had retained counsel. *Id.* at 893. The Third Circuit concluded that under those particular circumstances, the defendant was "confronted with the organized resources of an ongoing police investigation by agents who were well aware of his legal representation." *Id.* The court reasoned that the defendant's right to counsel attached while the police investigation was ongoing. *Id.*

While the Government does not advocate for a fact-sensitive review as required of the Third Circuit's departure from *Kirby*, the facts are easily distinguished. Unlike Matteo, the Defendant was not in police custody and had not been subject to any formal arraignment proceedings. The Defendant was not represented by counsel, nor was the Government aware that Defendant had retained counsel. Further, unlike the law enforcement officers in *Matteo*, the Government had not involved prosecutor's in the FBI investigation of the Defendant and was still in the process of gathering evidence. The recorded conversation between the Defendant and Special Agent Ristroph was used to obtain information to confirm the Defendant's knowledge of and participation in the

illegal gambling operation. Ristroph's conversation was pointed at obtaining direct evidence of the crime, as opposed to the circumstantial evidence obtained otherwise.

Even if the defendant's right to counsel was triggered prior to the recorded conversation with Special Agent Ristroph, this Court should uphold the decision of the Fourteenth Circuit because the Government's conduct is not violative of the Sixth Amendment. The Government violates the defendant's Sixth Amendment rights when it intentionally elicits incriminating statements from the defendant once the defendant's right to counsel has attached. *See Maine v. Moulton*, 474 U.S. 159 (1985). The court concluded that the officer's technique of representing that he had forgotten details and asking the defendant to "refresh his memory" constituted inducing incriminating statements from the defendant. *See Moulton*, 474 U.S. 159.

Special Agent Ristroph's question technique departs from other case law which found that the law enforcement agent was intentionally inducing incriminating statements. The Government did not intentionally elicit incriminating statements. Special Agent Ristroph instead represented that he was an associate of Roxy Roulette and that his call with other associates had been "cut short."

III. LUCY WASHINGTON'S GRAND JURY TESTIMONY IS INADMISSIBLE HEARSAY UNDER FEDERAL RULE OF EVIDENCE 802 AND IS NOT SUBJECT TO THE UNAVAILABLE WITNESS EXCEPTION UNDER RULE 804(B)(1).

This Court should affirm the decision of the Court of Appeals for the Fourteenth Circuit holding that Lucy Washington's Grandy Jury testimony is inadmissible hearsay under Federal Rule of Evidence 802 ("Rule 802") which is not subject to the unavailable[1] witness exception under Rule 804(b)(1) ("Rule 804(b)(1)"). Former testimony of an unavailable witness is admissible at trial if the party against whom the evidence is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." FED. R. EVID. 804(b)(1); *see also* FED. R. EVID. 802. In *United States v. Salerno*, this Court held that Rule 804(b)(1) requires proof that the Government had a "similar motive" when the former testimony was elicited. 505

[1] The parties agree that Ms. Washington was unavailable as a witness at the time of trial due to her tragic death on June 21, 2022. R. at 10; *see* Fed. R. Evid. 804(a)(4).

U.S. 517, 525 (1992) (remanding the case to the Second Circuit Court of Appeals for a determination as to whether the Government had a "similar motive" when taking the disputed Grand jury testimony). This Court was explicit that neither adversarial fairness nor forfeiture of any "privilege" over the testimony by the opposing party by taking a position contradictory to the testimony are sufficient legal grounds to admit former testimony absent a similar motive. *Id.* at 323–25. The Circuits have interpreted the "similar motive" requirement imposed on Rule 804(b)(1) by *Salerno* to mean quite different things.

The division is marked by the D.C. and the Second Circuits. *Compare United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990) (holding that when the testimony at Grand jury was directed to the "same issue" of the guilt or innocence of the defendant, that the government had the same motive to question as they do at trial), *with United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (holding that the government must have a similar intensity to prove the same issue). The D.C. Circuit and Ninth Circuits have interpreted the words "similar intent" of Rule 804(b)(1) and the *Salerno* Court's "similar motive" to result in an incredibly high level of generality. Grand jury testimony of an unavailable witness is admissible, according to these Circuits, if the testimony at Grand jury goes toward the guilt or innocence of the defendant the Government retains a "similar motive." *Miller*, 904 F.2d 65 ("[T]estimony was to be directed to the same issue—guilt or innocence of Morris and Ross.").

Under the D.C. and Ninth Circuit's construction of the "similar motive" requirement of Rule 804(b)(2) renders that requirement meaningless. If the threshold question is simply whether or not Grand jury testimony goes toward the guilt or innocence of the defendant, effectively any testimony given by a witness during a Grand jury who subsequently becomes unavailable becomes admissible. This is certainly not the narrow exception that Congress and this Court have carved out in later, controlling precedent. *Salerno* overruled the *Miller* court's reading of Rule 804(b)(1) and requires reviewing courts to look to whether the party seeking to admit the former testimony

of an unavailable witness has demonstrated that the government had a similar motive during the grand jury. *See Salerno,* 505 U.S. 517, 525 (1992).

The First and Second Circuits, by contrast, provide this Court with a fact-based test for establishing whether or not former Grand jury testimony should be admitted under Rule 804 (b)(1) by analyzing the opportunity and motivations of the government during the former testimony as instructed by this Court. *See United States v. DiNapoli*, 8 F.3d 909, 914 (2d. Cir. 1993) (holding that the party against whom the former Grand jury testimony is offered must have "an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue."); *United States v. Omar*, 104 F.3d 519 (1st Cir. 1997) (holding that if the Government has the opportunity and similar motive to develop the testimony that the testimony may be admissible under Rule 804(b)(1)).

Here, the Court should apply the First and Second Court's application of a fact-based test for establishing whether the Government developed the former testimony with the same motivation. At issue in this case is the former federal Grand jury testimony. Grand jury testimony highlights a critical limit of the former testimony exception under Rule 804(b)(1) because the proceeding is inherently different from a trial. The First and Second Circuits apply a fact-based rule that requires the reviewing court to examine the motive and intensity of the Government when developing the former testimony. *See DiNapoli*, 8 F.3d 909; *Omar*, 104 F.3d 519.

A. The Government's Interest in Establishing the Witness's Direct Testimony Before the Grand jury Lacked the Requisite Intensity or Purpose Examination During Trial to Satisfy the "Similar Motive" Test.

The Government lacked a similar intensity to prove the validity of Lucy Washington's Grand jury testimony. In order to admit former testimony of an unavailable witness under Rule 804(b)(1) and Rule 802 the Government, or the party against whom the evidence is offered, must have had an interest of "a substantially similar intensity to prove the same issue as they do later at trial." *DiNapoli*, 8 F.3d 914. In *United States v. DiNapoli*, the Second Circuit established that to determine whether a "similar motive" exists under *Salerno*, the reviewing court must conduct a

fact-based analysis. 914 (2d Cir. 1993). Under *DiNapoli,* whether or not the Government engages in cross-examination of the witness is immaterial. *Id.* Therefore, the reviewing court must look to the particular circumstances under which the former testimony was taken.

In *DiNapoli,* the Second Circuit concluded that because the grand jury testimony took place after the defendant had been indicted and the grand jury had indicated that they did not believe the testimony of the witness. *Id.* at 915. The court concluded that those circumstances "dispel[ed] similarity of motive, and the absence of similar motive is not rebutted by the limited cross-examination undertaken by the prosecutor at the grand jury." *Id.* Unlike the testimony in *DiNapoli,* the testimony of Lucy Washington was taken prior to the indictment of the Defendant and during the ongoing police investigation. These circumstances, though markedly different from *DiNapoli,* also foreclose a possibility that the Government's motivation during grand jury was the same as it would have been at trial.

Further, the record does not contain any indication that the Government was in possession of any evidence that may have been used to discredit the Ms. Washington's testimony when it was given. The First Circuit Court of Appeals expanded the Court's focus on the motivation of the Government during the former testimony to include the "opportunity" of the Government to question the witness with the same motivation. In *United States v. Omar,* the court evaluated whether the former testimony was given before or after the indictment of the defendant and what other evidence the Government had uncovered by that time to actually undermine the former testimony when it was given. 104 F.3d 519 (1st Cir. 1997). In *Omar,* the government had not discovered direct evidence that would have enabled it to refute the testimony by impeaching the witness's false or misleading statements.

While the Government was able to question the truthfulness of Ms. Washington's testimony, the Government was unable to submit proof to the jury as a means of discrediting all or part of Ms. Washington's testimony. Therefore, the intensity of the Government to prove that Ms. Washington was a truthful witness departed greatly at the grand jury by virtue of the

Prosecutor's inability during the grand jury to impeach a witness absent strong, direct evidence to the contrary. These circumstances, like those in *DiNapoli*, "dispel similarity of motive." *See United States v. DiNapoli*, 8 F.3d 914 (1993).

At the time of Ms. Washington's grand jury testimony, the defendant had not yet been indicted. In addition, the Government lacked the same opportunity under *Omar* to impeach Ms. Washington using the circumstantial evidence that it had uncovered in Defendant's storage locker. It has also not been established whether the Government's investigation of Defendant and Hoyt's Tavern revealed that Defendant was working with Ms. Washington on his illegal business operations prior to the grand jury testimony. Without the same information that the Government would have later during trial, the Government did not have the same opportunity or motivation to examine Ms. Washington or to elicit testimony with the same intensity.

The Government did not possess a similar motive of substantially the same intensity or purpose when it examined Lucy Washington during the grand jury. The Government's examination of Lucy Washington was limited due to the inherent lack of information and evidence during that stage of the investigation. In addition, the Government was operating with a substantially different purpose when it took Ms. Washington's testimony before the grand jury than it would have had in front of the jury at trial. The Government has good reason to preserve certain facts for trial when the Government is tasked with reaching substantially higher burden of proof. Both the Government and the Defendant were unable to call Lucy Washington at trial where the Government's attorneys may have challenged the witness in front of the jury.

i. The occurrence of cross-examination during former testimony does not create a presumption of admissibility because cross-examination alone is insufficient to constitute similar motive of the party against whom the former testimony is now offered.

The occurrence of cross-examination during former testimony does create a presumption of a similar motive. *See United States v. DiNapoli*, 8 F.3d 914, 915 (1993). In *United States v. DiNapoli*, the Second Circuit held that the occurrence of cross-examination did not rebut the absence of a similar motive. *Id.* Rather, the court concluded that "[a] prosecutor may have varied

motives for asking a few challenging questions of a grand jury witness who the prosecutor thinks is lying…the prosecutor might want to afford the witness a chance to embellish the lie, thereby strengthening the case for a subsequent perjury." *Id.* The Government did not engage in full-blown cross-examination of Lucy Washington given the obvious limitation of the grand jury—the Defendant was not present, and the witness appears unrepresented. The Government's attorney asked Ms. Washington if her statements regarding the Defendant's naivete to the ongoing criminal enterprise. Like the prosecutors in *DiNapoli*, the Government has the opportunity during grand jury testimony to preserve a position for trial or preserve perjury on the record for subsequent prosecution of the witness herself.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed in its entirety.

Respectfully Submitted,

s/o Team 36R

Attorneys for the Respondent

Applicant Details

First Name	**Hayfa**
Last Name	**Ayoubi**
Citizenship Status	**U. S. Citizen**
Email Address	**hayoubi@unc.edu**
Address	**Address** Street **1300 FORDHAM BLVD APT 408** City **CHAPEL HILL** State/Territory **North Carolina** Zip **27514** Country **United States**
Contact Phone Number	**9804284901**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**August 2019**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**NC Journal of Law & Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Weissman, Deborah
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919.962.3564
Rosellini, Skyler
rosellini@healthlaw.org
Scardulla, Annie
scardull@email.unc.edu
985-320-7797

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1300 Fordham Blvd, Apt 408
Chapel Hill, NC 27514

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at the University of North Carolina School of Law and the executive editor of the North Carolina Journal of Law & Technology. I am writing to apply for a 2024-2025 clerkship with your chambers.

After completing Judicial sentencing, a class that explores the sentencing guidelines in North Carolina and the North Carolina Structured Sentencing Act, I developed a deeper understanding of the judge's role in the administration of justice. I especially enjoyed participating in the sentencing workshops during which I discussed different criminal cases with North Carolina judges and learned about their sentencing policies and philosophies. I believe that a clerkship is a great experience to learn more about the judicial process, refine my writing and research skills, and work with experienced judges and lawyers on complex legal issues.

As an aspiring litigator with federal litigation experience, I believe I would be a great addition to your chambers. My work experience reflects my commitment to tackling social justice issues and refining the skills that will make me a great advocate and judicial clerk. This summer, I am interning with the criminal justice advocacy clinic at Yale where I am assisting the team with drafting pleadings and preparing for a *Schlup* evidentiary hearing in the United States District Court for the Middle District of Alabama. In addition to my work experience, I have developed solid legal research and writing skills as a staff member on the North Carolina Journal of Law & Technology. My piece which explores the concept of inventorship in patent law was published in January 2023.

A resume, transcript, and writing sample are enclosed. Please let me know if I can provide any additional information. I can be reached by phone at (980)428-4901 or by email at hayoubi@unc.edu. Thank you for your consideration.

Respectfully,

Hayfa Ayoubi
Candidate for Juris Doctor 2024

HAYFA AYOUBI
1300 Fordham Blvd., Apt. 408, Chapel Hill, NC 27514
(980)428-4901 | hayoubi@unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2024

- Honors & Activities: Executive Editor, *North Carolina Journal of Law & Technology Vol. 25*
  Kilpatrick Mock Trial Competition, Semifinalist and best advocate
- Publications: Hayfa Ayoubi, *Artificial vs. Natural: Should AI Systems Be Named as Inventors on Patent Applications?,* N.C. J. L. & TECH., Dec. 2022, at 1.
- Pro Bono: Cancer Clinic, Immigration Clinic, Expunction Project, Innocence Project, and Medicaid Appeals Project

Pennsylvania State University, University Park, Pennsylvania
Bachelor of Arts, Dual Degrees: Psychology and Law & Society, August 2019

- Phi Delta Phi (International Legal Honor Society), *Treasurer*

EXPERIENCE

Criminal Justice Advocacy Clinic- Yale Law School, New Haven, CT
Fellow, May 2023- Current

- Conducted research and assisted with drafting pleadings for a *Schlup* evidentiary hearing.
- Assisted with the advocacy for an individual with mental health conditions.

The National Health Law Program
Extern, January 2023- April 2023

- Drafted memos on federal privacy laws, medical loss ratio, independent medical review, and journalist's shield law and a blog post on Medicaid doula care.

O'Neill Institute for National & Global Health Law, Washington, D.C.
Addiction Policy Intern, May 2022- July 2022

- Researched and drafted memos on various issues relating to addiction policy and the law

Muslim American Society of Charlotte-Youth Division, Charlotte, North Carolina
Director, August 2019-June 2021

- Led community service, social activities, and fundraisers for the youth group.

CVS Pharmacy, Huntersville, North Carolina
Pharmacy Technician, September 2020-February 2021

Doital USA, Inc., Charlotte, North Carolina
Office Assistant for Property Manager, August 2019-March 2020

Mecklenburg County Court-Family Court Administration, Charlotte, North Carolina
Legal Intern, January 2019-April 2019

- Assisted the SelfServe Center staff and the Family Court staff

PUBLICATIONS

Hayfa Ayoubi, *When Desperate Times Should NOT Call for Desperate Measures: Fourth Amendment Protections Against (Unreasonable) Digital Surveillance that Became Standard Practice During the Pandemic*, N.C. J. L. & TECH. BLOG (Oct. 12, 2022).

Hayfa Ayoubi & Karishma Trivedi, How the Dobbs Ruling Will Affect People with Substance Use Disorder, BILL OF HEALTH BLOG (Aug. 16, 2022).

INTERESTS

Biking, boot camps, kickboxing, card games, and board games

Seq Nbr 1
ID 730500035 Hayfa Ayoubi

Internal Unofficial Transcript - UNC Chapel Hill

Pro Bono Program: 75+ Hours of Service

Name : Hayfa Ayoubi

Student ID: 730500035

Print Date : 2023-06-10

- - - - - Academic Program History - - - - -

Program : SL Juris Doctor

2021-06-25 : Active in Program

2021-06-25 : Law Major

- - - - - Beginning of School of Law Record - - - - -

2021 Fall

LAW	201	CIVIL PROCEDURE	4.00	4.00	B-	10.800
LAW	205	CRIMINAL LAW	4.00	4.00	B	12.000
LAW	209	TORTS	4.00	4.00	B-	10.800
LAW	295	RES,REAS,WRIT,ADVOC I	3.00	3.00	B	9.000
TERM GPA :	2.840	TERM TOTALS :	15.00	15.00		42.600
CUM GPA :	2.840	CUM TOTALS :	15.00	15.00		42.600

2022 Spr

LAW	204	CONTRACTS	4.00	4.00	B	12.000
LAW	207	PROPERTY	4.00	4.00	B	12.000
LAW	234A	CONSTITUTIONAL LAW	4.00	4.00	B	12.000
LAW	296	RES,REAS,WRIT,ADVOC II	3.00	3.00	B+	9.900
TERM GPA :	3.060	TERM TOTALS :	15.00	15.00		45.900

	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Fall

LAW	220	ADMINISTRATIVE LAW		3.00	3.00	A-	11.100
LAW	242	EVIDENCE		4.00	4.00	B	12.000
LAW	266	PROF RESPONSIBILITY		2.00	2.00	B	6.000
LAW	398	HUMAN RIGHTS POLICY LAB		4.00	4.00	B+	13.200
	TERM GPA :	3.254	TERM TOTALS :	13.00	13.00		42.300
	CUM GPA :	3.042	CUM TOTALS :	43.00	43.00		130.800

2023 Spr

LAW	206	CRIM PRO INVESTIGATION		3.00	3.00	B+	9.900
LAW	301	LEGISLATIVE ADVOCACY		2.00	2.00	A-	7.400
LAW	358	JUDICIAL SENTENCING		3.00	3.00	B+	9.900
LAW	443	COMMERCIAL ARBITRATION		3.00	3.00	B+	9.900
LAW	500	EXTERNSHIP		6.00	6.00	PS	
	TERM GPA :	3.373	TERM TOTALS :	17.00	17.00		37.100
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Fall

LAW	244	FAMILY LAW	3.00			
LAW	311	SUPREME COURT PROGRAM	3.00			
LAW	430	TRUSTS AND ESTATES	3.00			
LAW	465	CURRENT ISSUES LAW & MEDICINE	3.00			
LAW	516	CONTRACT DRAFTING	3.00			
TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000	
CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900	

2024 Spr

LAW	228	BUSI ASSOCIATIONS	4.00			
LAW	426	COMPLEX CIVIL LITIGATION	3.00			
LAW	451	HEALTH LAW ORGANIZATION	3.00			
LAW	468	REGULATION AND DEREGULATION	3.00			
LAW	545	PROSECUTOR PRACTICUM	2.00			
TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000	
CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900	

Cancel

June 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation on behalf of Hayfa Ayoubi who is applying for a clerkship with you. Ms. Ayoubi is a rising third-year law student at the University of North Carolina Law School. She was in my Human Rights Policy Lab, a four-credit rigorous writing class in which students learn international human rights law and engage in experiential work developing policy papers to assist individuals who have been tortured. In addition to formal class meetings, students meet with me at least one additional time on a weekly basis to discuss their research and projects, review questions, assess challenges, and plan next steps in small group settings. As a result, I had considerable opportunity to observe Ms. Ayoubi and evaluate her strengths and skills.

Ms. Ayoubi was always well-prepared for class. She asked and answered challenging questions, and indicated a dedication to grasping international norms and their application in circumstances that are considered quite challenging. She was well-spoken during class discussions and as reflected in her resume; she was a semifinalist in the Kilpatrick Mock Trial Competition and received the best advocate award for oral advocacy in her first year. Ms. Ayoubi was particularly thoughtful with regard to assigned readings and writing assignments. She often came up after class, distinguishing herself from her classmates, to ask follow-up questions. She was highly motivated to do well and indicated a sincere desire to excel in her writing skills. She has, in fact, published several law journal blogs to that end.

I also had an opportunity to observe Ms. Ayoubi collaborate with other students with whom she worked and shared responsibilities for preparing sections of the group policy project. She was congenial, supportive, and encouraging as she engaged with her colleagues.

Ms. Ayoubi has been fully engaged in the many opportunities provided by UNC Law School to obtain lawyering and professional skills. Her resume reflects her various volunteer activities and her significant hours to *pro bono* activity. Her externship experiences have widened her perspectives about the practice of law and have enabled her to acquire important skills that would be of use in a judge's chambers. She thoroughly enjoyed her course on judicial sentencing and has relayed to me that she has developed a better understanding of the judge's role in the administration of justice and has learned about sentencing policies and philosophies. A clerkship would allow her to learn more about the judicial process, refine her writing and research skills, and work with experienced judges and lawyers on complex legal issues.

I strongly support her application and hope you will consider her for a clerkship. If you would like any further information, please feel free to contact me (weissman@email.unc.edu) or by phone (919)962-5108.

Sincerely,

Deborah M. Weissman
Reef C. Ivey Distinguished Professor of Law
UNC School of Law

June 2, 2023

RE: Letter of Recommendation

Dear Hiring Manager:

My name is Skyler Rosellini and I am a Senior Attorney and intern coordinator with the National Health Law Program. I supervised Hayfa while she externed with NHeLP during the spring semester of 2023. I am writing this letter as a recommendation for Hayfa. I believe that her work ethic, her analytical and writing skills, and her ability to work through a diverse range of complex legal issues will make her an effective law clerk.

During her externship with NHeLP, Hayfa worked on a diverse range of projects related to health access. Projects included access to mental health, reproductive and sexual health, and dental services. Specifically, she drafted memoranda on federal health privacy laws as they apply to states, medical loss ratios related to dental services, the independent medical review process and how to expand in counties with more limited health plan appeal avenues, and the California "shield law" in the context of journalists' privacy with certain unpublished materials. She also consistently monitored *amicus curiae* efforts in cases related to low-income health care programs for our ongoing litigation efforts related to health access. Hayfa also drafted a publication on Medicaid coverage of doula care, which is a prominent health policy issue and a core part of our reproductive and sexual health substantive priorities. Her

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3701 Wilshire Boulevard, Suite 750 · Los Angeles, CA 90010 · (310) 204-6010
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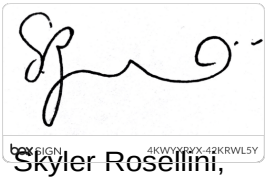
www.healthlaw.org

publication was shared on our website and is a valuable source of information on the doula benefit as its popularity increases across the U.S.

Overall, I was impressed with Hayfa's responsiveness to constructive feedback and her curiosity and willingness to take on a diverse portfolio of projects with high levels of complexity. She was always a team player and willing to help our team with longer term projects and time sensitive ones, while being able to shift her work load to meet the deadlines in a timely manner. Hayfa also demonstrated a strong work ethic, which was evident through my communications and collaboration with her. Hayfa's strengths are her thorough and clear research and writing skills. She demonstrated her ability to carefully analyze new legal issues, particularly the applicability of the California Shield Law to health care investigations. Her confidence and ability to produce thorough and well-researched work product would make her a valuable addition to your department.

Thank you for your consideration. Should you have any questions, please do not hesitate to contact me at rosellini@healthlaw.org.

Sincerely,



Skyler Rosellini,
Senior Attorney


NATIONAL
HEALTH
LAW
PROGRAM

June 17, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Hayfa Ayoubi and recommending her for the clerkship position in your chambers. I worked with Hayfa as her first-year Legal Research, Reasoning, Writing, and Advocacy (RRWA) professor. I know her to be hardworking and eager for a chance to demonstrate her intellect and passion for the law. As noted below, Hayfa would be an asset to your chambers for multiple reasons.

First, Hayfa is a quick study. For a year, she worked hard to master structure, clarity, and depth in her writing. She worked independently and demonstrated initiative. At the same time, she welcomed feedback, and she always incorporated my instruction when necessary.

Moreover, even as a 1L course, RRWA involves relatively intense research instruction, and Hayfa was able to set herself apart in this regard as well. She demonstrated proficiency in researching state and federal statutes, regulations, cases, and secondary sources. Equally as important, she was able to apply the law she located. Hayfa's research skills are further evidenced by her submission materials. Even as a busy law student, she has prioritized time to research and write important journal and blog pieces.

Second, Hayfa is generous with her talent and spirit. In RRWA, the students learn in groups through various interactive exercises and activities. Proficiency levels can vary, so a student's interpersonal skills are often tested just as frequently as their analytical skills. Hayfa was an honest yet empathetic peer. She provided thorough yet fair feedback and never judged others or isolated herself.

Further, Hayfa is a pleasure to collaborate with. I know that a judge's chambers is an intimate work environment, and I believe that Hayfa will fit in well. In the time that I taught her, we met for an individual conference at least four times. Every time, she showed up prepared, pleasant, and ready to actively listen and learn. I know that your team would find her to be a wonderful colleague.

Overall, I am confident that Hayfa would not take this opportunity for granted. If you have any further questions, you can reach me at scardull@email.unc.edu or 985-320-7797. Thank you for your time.

Sincerely,

Annie Scardulla

United States District Court for the District of Arizona Tucson Division

Trilátero Tex-Mex, LLC, Plaintiff, -v- Hector's Restaurants, LLC, Defendant	Civil Action 21-1986 Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 56

Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment

The triangle-shaped tortillas are not protectable by the Lanham Act, because they're functional as a matter of law. The shape of the tortilla enhances its taste and allows for bonus filling after the meal, the advertising promotes the functionality of the triangle-shaped tortillas, and the design has a comparatively simple and inexpensive method of production. Accordingly, the defendant respectfully requests that the court enter judgment in its favor.

Statement of Facts

I. Plaintiff, Trilátero Tex-Mex, LLC, owns and operates 21 restaurants.

Plaintiff opened its first restaurant in 2007 and currently operates a chain of restaurants throughout California, Arizona, and Nevada, doing business under the name Trilátero Tex-Mex. Compl. ¶¶ 5, 6. The restaurant serves a menu of Mexican and Tex-Mex cuisine, including staples such as tacos, burritos, fajitas, enchiladas, quesadillas, and tortas, and has offered certain tortilla wraps in the shape of triangles. Compl. ¶ 8.

II. From the opening of its first restaurant, Plaintiff has consistently marketed its triangle-shaped tortillas in many different ways.

This includes the name of Plaintiff's restaurant—Trilátero—which translates "three-sided" and was chosen to associate the restaurant with triangle shapes. Compl. ¶ 11(a); Def.'s Mot. Summ. J. Ex. A, 19:25-26. It also includes the Plaintiff's logo, used prominently in signage, on menus, and on its website, which features a picture of a dinosaur holding a taco wrapped in a triangle-shaped tortilla. Compl. ¶ 11(b). In addition, Plaintiff has used many slogans that tout the advantages of triangle-shaped tortillas. These slogans include: "It Tastes Better on a Triangle"; "Taste the Triangle!"; and "Caution: Sharp Corners Ahead." 12. *Id.* ¶ 11(d).

III. Plaintiff makes its triangle-shaped tortillas with the same method and ingredients as its the typical round tortillas.

Plaintiff makes its triangle-shaped tortillas using the same ingredients and virtually the same method as standard round tortillas: the tortilla mixture is pressed down with an industrial tortilla press. *Id.* ¶¶ 15, 16. The only difference is that, after the tortillas are pressed into circles, an employee cuts them into triangles. *Id*. The employee then adds the cut off parts to the next batch of dough on the front end and runs it back through the machine. Ex. A, at 13:12-13. Making triangle tortillas doesn't cost any more than making round ones. *Id.* at 13:14.

IV. Taste is important in determining the shape of the tortilla.

Plaintiff testified that a square-shaped tortilla would not be workable due to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar ratio as the typical round tortilla. *Id. at* 17:13-14.

V. Many customers enjoy the triangle tortillas.

Internet reviews of Plaintiff's restaurants regularly refer to the triangle-shaped tortillas. Compl. ¶ 14. Ten percent of the customer reviews mentioned liking the ratio of filling to tortilla and that the triangle shape made some of the filling fall out. Ex. A, at 19:19-20.

VI. Defendant owns and operates four different restaurants in Arizona, including one restaurant which serves triangle tortillas.

Defendant, Hector's Restaurants, LLC, opened its first restaurant in Tempe, Arizona in 2015 and currently has four restaurants across Arizona. Compl. ¶ 18; Ex. A, at 10:5. Defendant began serving some of its menu items on triangle-shaped tortillas in its Phoenix restaurant in 2018 and has since begun to serve some menu items on triangle-shaped tortillas in many of its restaurants. Compl. ¶ 20. For at least two years, Defendant has marketed its restaurants' use of triangle shaped tortillas in many ways, including that Defendant's advertising included the slogan "We Don't Cut Corners." *Id.* ¶ 21.

VII. Claiming that its triangle-shaped tortillas constitute trade dress, plaintiff filed a complaint pursuant to the Lanham Act, 15 U.S.C.A. § 1125, alleging that defendant infringed on its trade dress.

Argument

I. Defendant should be granted the motion for summary judgment under Rule (56).

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

a. There is no genuine dispute as to any material fact.

From the start of this litigation, there has been no dispute over the facts of the case. Plaintiff, Trilátero Tex-Mex, LLC, and defendant, Hector's Restaurants, LLC. agree that in 2017, defendant, who owns and operates four restaurants in Arizona, started serving its own version of triangle-shaped. Compl. ¶ 18, 20; Answer 18, 20. Parties further agree that plaintiff, which owns and operates twenty-one restaurants throughout California, Nevada, and Arizona and has been in business since 2007, serves some of the food items on triangle-shaped tortillas. Compl. ¶ 5-7, 9; Def.'s Mot. Summ. J. Ex. B, 14:14, 28. Evidently, there is no genuine dispute as to any material fact.

b. Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

To prove that a competitor infringed trade dress under section 43(a) of the Lanham Act, the owner of the claimed trade dress must prove three elements: (1) the product's design is nonfunctional, (2) the design is distinctive, and (3) the public will likely confuse the two products. *Disc Golf Ass'n, Inc. v. Champion Discs, Inc*., 158 F.3d 1002, 1005 (9th Cir. 1998).

In general, trade dress includes the overall look of a product and its packaging, including the design and shape of the product itself. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001). A product feature is functional and cannot serve as a trademark if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. *Id.* at 34.

To determine whether a product feature is functional, the court should consider these three factors: (1) whether the design yields a utilitarian advantage, (2) advertising touts the

utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture. *Disc Golf* , 158 F.3d at 1006.

First, we will analyze how the design and shape of the triangle-shape tortilla makes utilitarian advantages. Then, we will discuss how the plaintiff's advertising promoted the functional advantages of the product. Finally, we will show how the design has a comparatively simple and inexpensive method of production.

1. **The triangle-shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.**

   The issue is not whether a product is functional, but whether this particular shape and form of product which is claimed as trade dress is functional. *Disc Golf Ass'n, Inc.*, 158 F.3d at 1008. The product feature does not have to provide multiple utilitarian advantages and one utilitarian advantage is sufficient. *Id.* at 1007.

   The Ninth Circuit has not yet analyzed whether the effect of the product's shape on its taste is considered functional, but the Eleventh circuit held that a design or shape that contributes to the taste and consistency of a product is deemed essential to the product's purposes and affects its quality. *See Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206 (11th Cir. 2004). Furthermore, the customer's perception of the product due to its shape and design speaks to the functionality of the product. *See id*. In *Dippin' Dot*s., the court found that the spherical shape of dippin' dots allows for the quick and even freeze which is important to the taste and consistency of the product, making a product functional. *Id.* The court also relied on the fact that 20% of customers believed that the spherical shape of the ice cream

enhanced the ice cream's flavor as a factor in assessing the utilitarian advantage of the product. *Id.*

In *Blumenthal*, the court ruled that Eames chairs' design yields no utilitarian advantage because the designers were focused on finding the exact right look of the chair and were mostly concerned with the visual or aesthetic impact of the product. *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 863 (9th Cir. 2020).

Here, the triangle shape of the tortilla provides not only one but two utilitarian advantages. Similar to how the spherical shape of the ice cream enhances the taste and consistency of the product in *Dippin' Dots*, the triangle shape creates a desirable filling to tortilla ratio and enhances the eating experience by allowing some of the filling to fall out. Ex. A, at 19:19-20. The shape of the tortilla allows for the proper distribution of the filling, which evidently affects the ratio of tortilla and filling, making it important for the taste of the product. Similar to how the opinion of a minority of the customers was considered a factor in weighing the functional advantage of the product, 10 percent of the Trilátero's customers mentioned liking the ratio of filling to tortilla in triangle-shaped tortilla and enjoyed the falling out of the filling and that further proves the functional advantage of the triangle tortilla. *Id.*

In comparison to *Blumenthal's* Eames chairs' design which was based on aesthetic concerns, Trilátero was mainly concerned with the filling and tortilla ratio in determining the shape of the tortilla and less concerned with creating a product that is unique. Trialtero testified that a square-shape would not be workable presumably due

to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar, if not more desirable, ratio as the typical round tortilla. *Id.* at 17:13-14, 19:19-20.

Therefore, the triangle shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.

2. Advertising of the product promoted the utilitarian advantages of the design.

If a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008.

The advantages of a specific design feature need not be touted explicitly, but may be implied from the advertisement as a whole. *Id.* In *Disc* Golf, the court found that while the plaintiff's advertising of its parabolic disc gold never mentions the term "parabolic," the inference of functionality is implicit in the advertising. *Id.* The phrasing used in the advertisement, coupled with a picture of a flying disc falling into a basket after hitting the parabolic chain, is enough evidence that its advertising promotes the functionality of the parabolic chain. *See Id.*

Advertising that touts functional features but includes messages aimed at nonfunctional features is, nonetheless, considered to promote the functionality of the product. *See Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.*, 349 F.3d 601, 604 (9th Cir. 2003). In *Talking Rain,* the plaintiff's use of "get a grip" as its slogan for the grip bottle promotes the functionality of the recessed area of the bottle which can provide a secure grip of the bottle. *Id.* at 603-04. While the plaintiff argued that its slogan has another meaning because it's a slang expression, the court reasoned that it's sufficient that the slogan promoted the functionality regardless of other potential interpretations. *Id.*

In the present case, the plaintiff's main slogan is "It tastes better in a triangle". Compl. ¶ 11(d). One of the utilitarian advantages of a triangle-shaped tortilla is the enhanced taste associated it with the tortilla to filling ratio. The language of the slogan clearly links the better taste to the triangle shape and alludes to a more enjoyable eating experience that results from the triangle shape of the product.

Similar to how the advertising in *Disc Golf* did not explicitly address the parabolic chain feature but was considered to promote the functionality of the feature when coupled with a picture that promotes the utility of the feature, advertising that doesn't explicitly promote the enhanced taste of the triangle-shape tortilla could be considered to promote that utilitarian feature when coupled with the name and logo of the restaurant. In some instances, the plaintiff uses certain phrases in advertising, such as "Mmm, Pointy" and "Taste the triangle". *Id*. The plaintiff crafted a name for the restaurant, Trilátero which means three-sided, in order to associate the restaurant with triangle shapes. Ex. A, at 19:25-26. In addition, the restaurant logo is a picture of a T. Rex holding a triangle-shaped taco. Compl. ¶ 11(b). On the face of it, phrases like and "Mmm, Pointy" and "taste the triangle" do not necessarily promote the enhanced taste associated with the triangle-shaped tortilla. However, when coupled with the name of the restaurant which references the triangle-shape as well as the logo with a triangle-shaped taco, it could be inferred that these phrases indeed advertise for the enhanced taste associated with the triangle shape of the product.

Similar to how the slogan "get a grip" in *Talking Rain* was deemed to be touting the functional feature of the grip bottle despite it being a slang expression with non-utilitarian interpretations, advertising that uses slang expressions yet promotes the

enhanced taste of the triangle-shaped tortilla is sufficient. On some occasions, plaintiff uses phrases in advertising, such as "Caution: Sharp Corners Ahead" and "Don't Be a Square". *Id.* ¶ 11(d). The defendant uses the slogan "We Don't Cut Corners." *Id.* ¶ 21. While these may be used as warning expressions or metaphors, they also clearly reference and imply the importance of the shape of tortilla. Moreover, when these expressions are interpreted in the context of a restaurant that has a name and a logo that promote the triangle-shaped tortillas, it could be inferred that these phrases indeed advertise for the utilitarian feature of the product.

Therefore, the advertising of the triangle-shaped tortilla promotes the utilitarian advantages of the product.

3- The design has a comparatively simple and inexpensive method of production.

A functional benefit may arise if the design achieves economies in manufacture or use. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008. A design achieves economies in manufacture or use when it is relatively simple or inexpensive to manufacture. *Id.*

In *Talking Rain*, the court found that because the grip feature reflects a comparatively simple method of manufacturing a structurally sound bottle that would not collapse, the trademarked bottle is functional. *Talking Rain Beverage Co. Inc.*, 349 F.3d at 604.

In *Blumenthal*, the trapezoidal frame and the one-piece seat and back of the Eames chair required at least some specialized technical equipment to manufacture, and therefore does not suggest a simple or inexpensive method of manufacture. *Blumenthal Distributing, Inc.*, 963 F.3d at 864.

The Ninth Circuit has not yet analyzed how the cost of the ingredients for making a product is assessed under functionality, but the Seventh Circuit held that products that utilize more expensive materials when compared to similar products do not achieve economies in manufacture. *Bodum USA, Inc. v. A Top New Casting Inc.*, 927 F.3d 486, 494 (7th Cir. 2019). In Bodum, the court ruled that that the Chambord French coffeemaker confers no cost or quality advantage that made it functional. *Id.* Of the many French presses that Bodum produced, the production of the Chambord is more expensive to produce than its counterparts with plastic frames, because its frame is made out of the more-expensive metal materials. *Id.*

Similar to how the production of grip feature provided the advantage of a non-collapsing bottle thereby making the manufacturing process efficient, the production of triangle tortilla made it possible to make a more desired tortilla while reusing the left over dough thereby making the manufacturing process efficient. Instead of losing dough, the employee adds the cut off parts to the next batch of dough and runs it back through the machine. Ex. A, at 13:12-13. It can be clearly established that the production of triangle tortillas made the manufacturing process efficient by saving and reusing dough.

In comparison to the Eames chair in *Blumenthal,* making triangle-shape tortillas does not require any specialized technical equipment to make. Instead, triangle tortillas are made using the same automatic tortilla-maker that rolls and presses the typical round tortillas, and are then cut to make it triangle. Compl. ¶ 16. Evidently, the triangle tortillas do not require any specialized technical equipment to make.

In comparison to the Chambord French press, Trilátero's triangle-shaped tortillas have the exact same ingredients as the typical round tortillas. Plaintiff makes its triangle-shaped tortillas with the same ingredients as standard round tortillas. Compl. ¶ 15. Making triangle tortillas doesn't cost any more than making round ones. Ex. A, at 13:14. It is clear that there no additional costs arising from the ingredients of the triangle tortilla.

Therefore, the design has a comparatively simple and inexpensive method of production.

Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

Conclusion

For the foregoing reasons, defendant Hector's Restaurants, LLC respectfully requests that this court enter judgment in its favor.

Applicant Details

First Name	**Halina**
Middle Initial	**R**
Last Name	**Bereday**
Citizenship Status	**U. S. Citizen**
Email Address	**hbereday@umaryland.edu**
Address	**Address** Street **1448 Sumwalt Ct.** City **Baltimore** State/Territory **Maryland** Zip **21230** Country **United States**
Contact Phone Number	**8137651667**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Maryland Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Energy and Sustainability Moot Court Competition Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Foundation**

Recommenders

Frey-Balter, Kathryn
kfrey-balter@law.maryland.edu
410-375-8764
Percival, Robert
rpercival@umaryland.edu
(410) 706-8030
Steinzor, Rena
rsteinzor@law.umaryland.edu
_410_ 706-0564

This applicant has certified that all data entered in this profile and any application documents are true and correct.

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD, 21230 | (813) 765-1667 | hbereday@umaryland.edu

April 2, 2023

Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am excited to apply for the position of Judicial Clerk for the 2024-2025 term. I am a second-year law student at the University of Maryland Francis King Carey School of Law and a graduate of Georgetown University in Washington, DC. My passion for judicial work led me to apply to your chambers in the United States District Court for the Eastern District of Virginia. I have worked and lived in Virginia for many years and plan to build a life here upon graduation from law school.

My substantial research and writing skills will make me an exceptional Judicial Clerk. I spent the last academic year as a judicial intern for two different judges on the U.S. District Court for the District of Maryland. This spring semester, I am a judicial intern to Judge Richard Bennett and, in the fall semester, I interned for Judge Lydia Griggsby. In both positions, I honed my writing expertise by constructing opinions, orders, and bench memoranda. My time as a research assistant for Professor Robert Percival has also refined my research skills, and I have aided his work in administrative, constitutional, and environmental law. Last summer, I improved this reasearch and writing prowess as a summer associate at MoloLamken LLP, a firm that specializes in complex trial, appellate, and Supreme Court litigation. This summer, I will further develop these abilities as a summer associate at Norton Rose Fulbright in Washington, DC.

Additionally, I serve as the Executive Editor for *Maryland Law Review* and am a member of the National Energy and Sustainability Moot Court Competition Team. My note on *West Virginia v. EPA* will be published this spring in *Maryland Law Review*. I also was published twice in college in Georgetown's environmental policy journal, *Cura Terra*, and the *Columbia Undergraduate Law Review*. These activities sharpened my research, writing, and editing abilities. I look forward to bringing these skills to your chambers.

Finally, my tenacity, grit, time management skills, and adaptability – developed through my time as an NCAA Division One rower– will enable me to succeed as a Judicial Clerk.

Thank you so much for your time and consideration. I look forward to hearing for you.

Sincerely,

Halina R. Bereday

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD 21230 | (813) 765-1667 | hbereday@umaryland.edu

EDUCATION

University of Maryland Francis King Carey School of Law
Juris Doctor Candidate, August 2021 – May 2024
GPA: 3.9, Rank: 12/226 (5.3%)
Honors: Donna Blaustein & Natalie R. DeMaar Scholarship Recipient (three-year full-tuition merit scholarship); National Energy Moot Court Competition Team (Selected out of 41 teams to advance to round of 16); CALI Excellence for the Future Award (Torts); High Distinction in Lawyering Skills
Extracurriculars: Environmental Law Society, Business Law Society, Women's Bar Association

Georgetown University, Washington, DC
Bachelor of Arts in Psychology, with minors in Environmental Studies & Religion, Ethics, and World Affairs, August 2017 – May 2021
GPA: 3.78
Honors: CRCA National Scholar Athlete, Patriot League Academic Honor Roll, First Honors, Second Honors, Dean's List
Extracurriculars: NCAA Division I Varsity Rowing, Vice President of The Grassroot Project, Georgetown Student Athlete Mentor

EXPERIENCE

University of Maryland Francis King Carey School of Law, Public Health Law Clinic, Baltimore, MD
Student Attorney, January 2024 – April 2024

Federal Trade Commission, Bureau of Competition, Washington, DC
Legal Intern, Mergers III, August 2023 – November 2023

Norton Rose Fulbright, Washington, DC
Summer Associate, Project Finance, May 2023 – July 2023

***Maryland Law Review*,** Baltimore, MD
Executive Editor, Vol. 83, January 2023 – Present
- Selected out of dozens of applicants to serve as the Vol. 83 Executive Editor on the Maryland Law Review Executive Board
- Spearheaded formatting of articles, preparation of articles for editing, and proofing final versions of articles

Staff Editor, Vol. 82, August 2022 – January 2023
- Authored note on U.S. Supreme Court case *West Virginia v. EPA*; one of three authors selected for publication in Vol. 82, Issue 3.

U.S. District Court, District of Maryland, Baltimore, MD
Judicial Intern, The Honorable Lydia K. Griggsby (September – November 2022), The Honorable Richard D. Bennett (January 2023 – Present)
- Drafted judicial opinions, orders, and bench memos on criminal, constitutional, contract, administrative, and civil rights law
- Facilitated criminal pre-trial judicial conferences and proceedings

University of Maryland Francis King Carey School of Law, Professor Robert Percival, Baltimore, MD
Research Assistant, June 2022 – Present
- Executed legal research on constitutional, environmental, energy, and regulatory law

MoloLamken LLP, Washington, DC
Summer Associate, May 2022 – June 2022
- Generated legal research and 10+ memoranda on constitutional and regulatory law and appellate and supreme court litigation
- Constructed motion in opposition used for Eighth Amendment pro bono criminal law case

U.S. House of Representatives, Office of the Congresswoman Deborah Wasserman-Schultz, Washington, DC
Congressional Intern, January 2021 – May 2021
- Formulated policy memos on energy, environmental policy, and sustainability, which convinced the Honorable Wasserman-Schultz to cosponsor relevant legislation

CVS Health, Washington, DC
Management & Leadership Intern, June 2020 – August 2020
- Evaluated waste disposal protocols, implemented a recycling program, and executed courses on regulatory and environmental law

PUBLICATIONS

West Virginia v. EPA: Majorly Questioning Administrative Agency Action & Authority. *Maryland Law Review*, April 2023.

A Reexamination of *Wisconsin v Yoder:* An Untenable Holding in the Modern Era. *Columbia Undergraduate Law Review.* December 2020. Presented at the Penn Undergraduate Law Journal x Columbia Undergraduate Law Review Fall 2020 Symposium.

Climate Change, Environmental Degradation, and Refugees: Displaced People in a Modernized World and the Case of the People of Tuvalu in the South Pacific. *Cura Terra.* June 2021.

LANGUAGES, CERTIFICATIONS, AFFILIATIONS, & INTERESTS

Languages & Certifications: Spanish, Lexis+ Proficiency, Westlaw Foundations in Legal Research
Professional Affiliations: Energy Bar Association; American Bar Association: Environment, Energy, and Resources; Infrastructure & Regulated Industries; and Administrative Law, Maryland State Bar Association: Environmental & Energy Law, Groton School Alumni Association
Interests: Hiking, tennis, squash, sailing, baking, traveling, film photography, running, and interior design

Student Information

Name

Halina Bereday

Curriculum Information

Current Program : Juris Doctor

Program	Major Concentration	Major and Department
Law Day	Law Cardin Required	Law, Law

Degrees Awarded

In Progress

Juris Doctor

Curriculum Information

Primary Degree

Major	Major and Concentration
Law	Law Cardin Required

Institution Credit

Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	527A	LW	CIVIL PROCEDURE	A	4.000	16.00		
LAW	530A	LW	CONTRACTS	B+	4.000	13.32		
LAW	535A	LW	TORTS	A+	4.000	17.32		
LAW	550A	LW	INTRODUCTION TO LEGAL RESEARCH	A-	1.000	3.67		
LAW	564A	LW	LAWYERING I	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	62.31	3.89
Cumulative	16.000	16.000	16.000	16.000	62.31	3.89

Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	501B	LW	ADMINISTRATIVE LAW	B-	3.000	8.01		
LAW	506A	LW	CRIMINAL LAW	A	3.000	12.00		
LAW	528A	LW	CON LAW I: GOVERNANCE	A	3.000	12.00		
LAW	534A	LW	PROPERTY	A	4.000	16.00		
LAW	565A	LW	LAWYERING II	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	60.01	3.75
Cumulative	32.000	32.000	32.000	32.000	122.32	3.82

Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	504R	LW	ENVIRONMENTAL ADVOCACY	A	2.000	8.00		I
LAW	508R	LW	ENERGY LAW	B+	2.000	6.66		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	A	3.000	12.00		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	556B	LW	ENVIRONMENTAL LAW	A	3.000	12.00		
LAW	572C	LW	BUSINESS ASSOCIATIONS	A-	3.000	11.01		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	14.000	14.000	14.000	13.000	49.67	3.82
Cumulative	46.000	46.000	46.000	45.000	171.99	3.82

Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	504R	LW	ENVIRONMENTAL ADVOCACY	A	2.000	8.00		I
LAW	509S	LW	FIN & ACCT BASICS FOR LAWYERS	CR	2.000	0.00		
LAW	514A	LW	LEGAL PROFESSION	A+	2.000	8.66		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	533U	LW	LAW & POL OF REGULATORY SYSTEM	A+	3.000	12.99		
LAW	534B	LW	CONFLICT OF LAWS	A	2.000	8.00		
LAW	540U	LW	ALR: ENVIRONMENTAL LAW (DIS)	A-	1.000	3.67		
LAW	596F	LW	INCOME TAXATION	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	13.000	54.31	4.18
Cumulative	62.000	62.000	62.000	58.000	226.30	3.90

Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	62.000	62.000	62.000	58.000	227.33	3.99
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	62.000	62.000	62.000	58.00	227.33	3.99

Kathryn Frey-Balter, Esquire
Professor of the Practice
Managing Director, Lawyering Program
kfrey-balter@law.umaryland.edu
410.375.8764

Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

April 5, 2023

RE: Letter of Recommendation,
Halina Bereday

Dear Judge Walker:

I write in strong support of Halina Bereday's application for a judicial clerkship in your chambers for the 2024-2025 term. She is a superior legal writer who works thoroughly, quickly, and independently.

Ms. Bereday was a student in my Lawyering I class at the University of Maryland Francis King Carey School of Law in Fall 2021. Lawyering I is a fast-paced, demanding class which focuses on legal writing and encompasses a multitude of skills that are essential to lawyering. Students learn foundational legal analysis and writing through a series of drafts which culminate in two objective Memoranda and these contours form a strong foundation for a judicial clerkship. Ms. Bereday's written submissions in this class were those of a seasoned professional. She earned the highest score on the first memorandum, where I commended her "top-notch writing and analysis." Again, she earned one of the top scores on her second submission where I noted her writing was "near-perfect," and the depth of her analysis through the implied factors she unearthed were notably sophisticated.

In addition, she earned a "distinction" in Lawyering Skills for her outstanding performance on a mock client interview, client letter, and her leadership during in-class exercises. Ms. Bereday always made insightful contributions to classroom conversations. She has a stand-out legal mind.

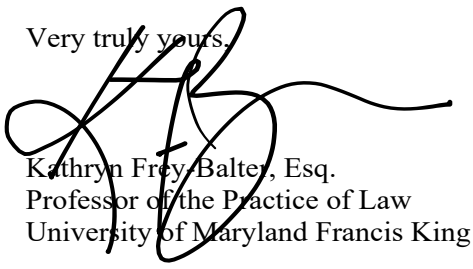
Unsurprisingly, Ms. Bereday earned a spot on our *Maryland Law Review*, her note on *West Virginia v. EPA* was selected for publication, and she was recently named Executive Editor. I have also heard from Ms. Bereday that she has excelled in both of her federal district court internships and has found the legal work in court to be fascinating and rewarding.

While I taught Ms. Bereday during the first semester of her first year, she has maintained a strong relationship with me. She reaches out for mentorship, absorbs feedback, and does not take her myriad successes for granted. That reflection and appreciation are markers of a great colleague. I am confident she would be a terrific addition to your judicial chambers.

I write with three decades' experience as a federal court practitioner, adjunct and full-time faculty member, and mentor. I am currently a Professor of the Practice and Managing Director of the Lawyering Program at the University of Maryland Carey School of Law. I was an Assistant Federal Public Defender at the Office of the Federal Public Defender for the District of Maryland for over a quarter-century (1992-2018). During that timeframe I was also an adjunct professor at University of Maryland Carey School of Law (Written and Oral Advocacy, twelve years during 2004-2020), and Catholic University, Columbus School of Law (Trial Practice, twelve years during 1998-2012). I was also a full-time faculty member at Stevenson University (Assistant Professor, Department of Law and Justice Studies, 2018-2020). As such, I am familiar with the traits one exhibits in academia that translate into professional success. I am confident that Ms. Bereday has the inquisitiveness, thoughtfulness, and work ethic that will make her an outstanding federal judicial clerk.

If you have any questions, feel free to contact me.

Very truly yours,



Kathryn Frey-Balter, Esq.
Professor of the Practice of Law
University of Maryland Francis King Carey School of Law

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Hallie Bereday for a clerkship with you. She is one of the most outstanding students I know well as demonstrated through her performance in class and her work as a research assistant to me.

I first met Hallie when she was a student in my first year Constitutional Law class during the Spring semester 2022. Hallie was one of the most frequent participants in class discussions, invariably making useful contributions to the dialogue. Thus, I was not surprised when, in a class of 64 students, Hallie's final examination received the sixth highest raw score, earning her a grade of "A".

I was so impressed with Hallie's performance that I hired her to be a research assistant for me during the summer of 2022. She performed exceptionally well in this position, writing outstanding memoranda on topics as diverse as the Dakota Access Pipeline, the history of the "major questions" doctrine, and how the Inflation Reduction Act amends the Clean Air Act. Hallie also did an exceptional job in helping me update the ninth edition of my environmental law casebook. As a result, I asked her to continue to serve as a research assistant during the 2022-23 academic year.

As a student in my Environmental Law class during the Fall 2022 semester, Hallie wrote a terrific final examination and received one of nine grades of "A" I awarded in a class of 39 students.

Hallie seems to have boundless energy and she is viewed as a leader by her fellow students. She is fiercely intelligent and has excellent research and writing skills. I know that she would make an exceptional law clerk.

Sincerely,

Robert V. Percival
Robert F. Stanton Professor of Law
Distinguished University Professor

Robert Percival - rpercival@umaryland.edu - (410) 706-8030

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Halina Bereday

Dear Judge Walker:

I am pleased to provide this strong recommendation for Halina Bereday, who expects to receive her juris doctor in May 2024 and has applied for a law clerk position in your chambers. Ms. Bereday is an outstanding student, with a lively intellect and a strong work ethic. She analyzes complex problems, researches them, and writes them up with skill and clarity significantly above her peers. She is indefatigable and always enthusiastic and curious. I am confident that she will become an excellent lawyer and would benefit greatly from her experience in your chambers.

I first got to know Ms. Bereday when she was a first-year student in my administrative law class. Although I strive to teach the course at a level accessible to first-year students, it is not for the faint of heart. Ms. Bereday participated actively in class, displaying a maturity about how people inside and outside the legal community view the disputes provoked by the government's role in society.

I was pleased to discover that, as a second-year student working on staff of The Maryland Law Review, Ms. Bereday elected to write a case note about West Virginia v. EPA, 142 S. Ct. 2587 (2022), a landmark decision that will have significant consequences for administrative law. West Virginia is a "major questions" case, and represents the first time that the Court discussed the doctrine using that label. It struck down a regulation under the Clean Air Act giving power plants the flexibility to decrease their greenhouse gas emissions through so-called "building blocks" that permitted fuel switching and trading among utilities. Surprisingly, the utilities were so enthusiastic about this approach that they intervened on behalf of the EPA before the Court. By then, implementing voluntary measures, they had met the targets first imposed by the Obama administrations but later rescinded by President Trump. The Court invalidated the regulation on the grounds that the EPA had gone beyond the statute to opine on topics of great economic significance for the energy industry and was not able to do so without a specific authorization by Congress that the Clean Air Act did not provide.

I became Ms. Bereday's faculty advisor as she wrote her Comment on this topic, while also following the academic commentary on the case. I was pleased to find that she was thinking about the case and its ramifications with the same level of sophistication as several other young scholars. Her article was selected by her peers for publication in the journal.

In spring 2023, Ms. Bereday enrolled in my advanced administrative law seminar, Law and Policy of the Regulatory System, where she and I did some more work on the article to make it more normative. It was exciting to watch her think through the ramifications of the decision from every angle, which is the advantage of continuing to work on a complex problem rather than shifting to another topic that receives less rigorous analysis. I will encourage her to write a shorter version that could be submitted to specialized, online sources for publication.
Ms. Bereday was an active participant in the class, politely challenging her peers as we considered regulatory case studies that reveal the challenges confronting government today. We had four outside experts attend the class, and she asked them perceptive questions that helped the class develop the lessons of each exploration.

Ms. Bereday attended Maryland Law on a full merits scholarship. Our resources are limited, and this distinction alone defined our expectations regarding her performance. She did not disappoint.

I am confident that Ms. Bereday will have a successful career as a lawyer and would take full advantage of the opportunity to begin that career as a judicial clerk. She is an exceptional young woman. Please do not hesitate to call me if you have any further questions at (301) 717-2405, which is my cell phone.

Sincerely,

Rena Steinzor
Edward M. Robertson Professor of Law

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD, 21230 | (813) 765-1667 | hbereday@umaryland.edu

WRITING SAMPLE

The attached writing sample is an opinion I wrote during my judicial internship with Judge Bennett in the Winter of 2023. With Judge Bennett's express recommendation, I have enclosed this memorandum order on a Motion for Compassionate Release which I wrote during my judicial internship in the U.S. District Court for the District of Maryland. The Background and Conclusion section has been omitted in the interest of brevity, and the opinion incorporates very minor edits from Judge Bennett.

MEMORANDUM ORDER

In 1994, Defendant Shelley Martin ("Martin") and his co-defendants trafficked narcotics, carried out robberies, and engaged in four murders. (Presentence Investigation Report ("PSR") ¶ 8.) On December 10, 2008, a jury acquitted Martin of murder but found him guilty of (1) Racketeering Conspiracy in violation of 18 U.S.C. § 1962(d) and Conspiracy to Distribute and Possess with Intent to Distribute Drugs in violation of 21 U.S.C. § 846. (Judgement, ECF No. 650.) On March 30, 2009, this Court[1] sentenced Martin to 400 months imprisonment. *Id.* On July 27, 2021, this Court amended Martin's sentence to 300 months pursuant to the First Step Act. Pub. L. No. 115–391, 132 Stat. 5194. (*See* Amended Judgement, ECF No. 869; Reason for Amended Judgement, ECF No. 870.) Martin's present release date is on or about November 16, 2025. (Medical Notice, ECF No. 882.)

On February 14, 2022, Martin pro se filed a Motion for Compassionate Release. (ECF No. 875.) On October 10, 2022, Martin pro se filed a Motion to Amend under FRCP Rule 15(a), including his amended Motion in these filings.[2] (ECF Nos. 880, 880-2.) Through these filings, Martin argues that his sickle-cell anemia leaves him susceptible to COVID-19, and that recent changes in sentencing law would result in a lesser sentence if he was convicted today. (Motion for Compassionate Release, ECF No. 875; Amended Motion for Compassionate Release, ECF No. 880-2.) With respect to factors under 18 U.S.C. § 3553(a), Martin argues that his personal circumstances, rehabilitation, and reentry plan weigh in favor of compassionate release. *Id.* This Court has reviewed Martin's Motions and supporting memorandum and finds no hearing is

[1] Defendant was originally sentenced by the Honorable Andre M. Davis, who has since retired. Thereafter, the case was reassigned to the undersigned.

[2] This Court hereby grants Martin leave to amend and shall consider Martin's amended Motion for Compassionate Release alongside his original Motion for Compassionate Release. (ECF No. 880-2, ECF No. 875.)

necessary. *See* Local Rule 105.6 (D. Md. 2021). For the reasons that follow, Martin's Motion for Compassionate Release is **DENIED**.

ANALYSIS

As Martin has filed his motion pro se, his arguments are afforded a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (holding that pro se filings are "held to less stringent standards than formal pleadings drafted by lawyers" (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1975))); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194, established significant changes to the procedures involving compassionate release from federal prison. Prior to the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i) provided the Bureau of Prisons ("BOP") with sole discretion to file compassionate release motions with the Court. With the passage of the First Step Act, defendants are now permitted to petition federal courts directly for compassionate release whenever "extraordinary and compelling reasons" warrant a reduction in sentence. The Act permits a defendant to seek a sentence reduction after he "has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Once these mandatory conditions are satisfied, this Court may authorize compassionate release upon a showing of "extraordinary and compelling reasons" warranting a reduction and after weighing the factors presented in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(1)(A)(i).

I. Administrative Exhaustion Requirements

Martin has satisfied the preconditions to filing his Motion for Compassionate Release. On November 22, 2021, Martin submitted a "Request for Administrative Remedy" addressed to the

warden of his facility requesting the warden to file a motion for compassionate release on his behalf. (Compassionate Release Documents of Exhaustion, ECF No. 879-1.) On February 23, 2022, Warden B.M. Trate denied Martin's request for Compassionate Release.[3] *Id.* As 30 days have elapsed since Martin's request was submitted to the warden, his motion is properly before this Court. *See* 18 U.S.C. § 3582(c)(1)(A).

II. Extraordinary and Compelling Reasons

The United States Sentencing Commission is charged with defining "what should be considered extraordinary and compelling reasons for sentence reduction" under 18 U.S.C. § 3582(c)(1)(A). 28 U.S.C. § 994(t). Of relevance here, the Commission has determined that "extraordinary and compelling reasons" exist where a defendant is "suffering from a serious physical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he is not expected to recover." U.S.S.G. § 1B1.13 cmt. n.1(A). Similarly, a defendant who is "(i) at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less," faces extraordinary and compelling circumstances that may justify release. U.S.S.G. § 1B1.13 cmt. n.1(B). Finally, the Commission has authorized the Bureau of Prisons to identify other extraordinary and compelling reasons "other than, or in combination with" the reasons identified by the Commission. U.S.S.G. § 1B1.13 cmt. n.1(D).

Although potentially useful guides, neither the Sentencing Commission's Guidelines nor the Bureau of Prisons' regulations constrain this Court's analysis. *United States v. McCoy,* 981

[3] Warden Trate denied Martin's request only after Martin filed the instant motion. Regardless, 30 days have elapsed since Martin's request was made and Martin's motion is properly before this Court. *See* 18 U.S.C. § 3582(c)(1)(A).

F.3d 271, 281 (4th Cir. 2020) (holding that U.S.S.G. § 1B1.13 is not an "applicable policy statement" for compassionate release motions filed by a defendant in the wake of the First Step Act). As Judge Blake of this Court has recognized, the First Step Act embodies Congress's intent to reduce the Bureau of Prisons' authority over compassionate release petitions and authorizes the district courts to exercise their "independent discretion to determine whether there are 'extraordinary and compelling reasons' to reduce a sentence." *United States v. Bryant*, CCB-95-0202, 2020 WL 2085471, at *2 (D. Md. Apr. 30, 2020); *accord McCoy*, 981 F.3d at 281 (holding that "the First Step Act allows courts independently to determine what reasons, for purposes of compassionate release, are 'extraordinary and compelling'").

Martin offers two potential "extraordinary and compelling" reasons to consider his motion. First, Martin suffers from sickle cell anemia, a condition that increases his risk to Covid-19. (Initial Motion for Compassionate Release, ECF No. 875.) Second, Martin argues that changes in sentencing law would impose a shorter sentence on Martin if he was convicted today. (Amended Motion for Compassionate Release, ECF No. 880-2.) Martin also notes he has served twenty years of his sentence. (Initial Motion for Compassionate Release, ECF No. 875.) This Court finds Martin's sickle cell anemia is "extraordinary and compelling," as explained below.

This Court has determined that a heightened susceptibility to COVID-19 may contribute "extraordinary and compelling" reasons for a sentence reduction. See, e.g., *United States v. Hurtt*, 14-0479, 2020 WL 3639987, at *1 (D. Md. July 6, 2020). However, "the coronavirus is not tantamount to a get out of jail free card." *United States v. Hiller*, 18-0389, 2020 WL 2041673, at *4 (D. Md. Apr. 28, 2020). For Covid-19 to be an "extraordinary and compelling" circumstance, the defendant must allege that they have a medical condition that puts them at higher risk, or that they have taken measures, such as vaccination, to protect themselves. *See United States v. Petway*,

No.21-6488, 2022 WL 168577 at *2 (D.Md. 2022) (considering individual's "particularized susceptibility" and Covid-19 vaccination status to evaluate if Covid-19 is "extraordinary and compelling"). Here, Martin has alleged that he has sickle-cell disease, a genetic disease that causes a shortage of blood cells and leaves him vulnerable to infection. (Initial Motion for Compassionate Release, ECF No. 875.) The government does not contest that this condition leaves Martin susceptible to COVID-19. This vulnerability constitutes an extraordinary and compelling circumstance that warrants considering his motion.

Addressing Martin's second alleged extraordinary and compelling circumstance, Martin argues that sentencing law has changed since he was convicted, and that this change would lessen his sentence had he been convicted today. (Amended Motion for Compassionate Release, ECF No. 880-2.) Intervening developments in sentencing law may constitute extraordinary and compelling reasons that justify a motion for a sentence reduction. *See, e.g.*, *United States v. Day*, 474 F. Supp. 3d 790, 798 n.16 (E.D. Va. 2020) (collecting cases); *United States v. Parker*, 461 F. Supp. 3d 966, 979–81 (C.D. Cal. 2020); *United States v. Smith*, 379 F. Supp. 3d 543, 546 (W.D. Va. 2019) ("Congress, when drafting the First Step Act in 2018, surely did not intend for courts to disregard the last six years of Supreme Court federal sentencing jurisprudence and this court declines to do so."). Among such changes, the Supreme Court has held that any facts used to raise the statutory maximum or mandatory minimum penalty for a crime must be established by a jury beyond a reasonable doubt—not found by the judge on the preponderance of the evidence. *Alleyne v. United States*, 570 U.S. 99, 108 (2013).

Martin incorrectly argues that *Alleyne* applies in his case and is "extraordinary and compelling." (ECF No. 880-2.) Martin was convicted of Racketeering Conspiracy based on predicate offenses of murder, armed robbery, and drug trafficking after a 36-day jury trial. (PSR ¶

1, 38.) Martin's base offense level of 43 was based on the jury conviction alone and was calculated on January 22, 2009. (PSR 2a, ¶ 38.) Martin's base offense level was established at his March 27, 2009 sentencing, at which time Judge Davis found that by the preponderance of the evidence, "Mr. Martin was there, that he had knowing involvement [as to the murder charges.]"[4] (Sentencing Transcript 45, ECF No. 710.) Further, Judge Davis granted Defendant a one level *downward* departure from offense level 43 to offense level 42 because "a life sentence in the case of this defendant would be more harsh than is warranted under the circumstances." (Statement of Reasons, ECF No. 651 *SEALED*.) *Alleyene* thus is not applicable here, as there were no "facts used to raise the statutory maximum or mandatory minimum penalty for a crime" that were not "established by a jury beyond a reasonable doubt." *Alleyne*, 570 U.S. at 108. As this Court finds that Martin's sickle-cell disease is sufficiently "extraordinary and compelling" to warrant considering his motion, this Court will address the 18 U.S.C. § 3553(a) factors.

III. 18 U.S.C. § 3553(a) Factors

A court must conduct an "individualized assessment" of a defendant's circumstances under 18 U.S.C. § 3553(a) to determine whether he is eligible for a sentence reduction. *McCoy*, 981 F.3d at 286. These factors require this Court to consider: (1) the defendant's personal history and characteristics; (2) his sentence relative to the nature and seriousness of his offense; (3) the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public; (4) the need for rehabilitative services; (5) the applicable guideline sentence; and (6) the need to avoid unwarranted sentencing disparities among

[4] As the Honorable Andre M. Davis explained at sentencing: "[T]he jury's decision not to convict Mr. Martin on the murder counts reflects at the least the jury's decision not just that the evidence as to Mr. Martin was insufficient, but that there is some cognizable difference between Mr. Martin and the other three defendants. [. . .] I believe that Mr. Martin was there, that he had knowing involvement, so I find by a preponderance of the evidence [that Martin was involved in murder]." (ECF No. 710.)

similarly-situated defendants. 18 U.S.C § 3582(c)(1)(A); 18 U.S.C. § 3553(a). On balance, the 18 U.S.C. § 3553(a) factors do not justify compassionate release.

There are some factors that favor Martin's release. First, Martin was a younger man at the time he was convicted. (Government Response 12, ECF No. 864.) He was convicted at age twenty-four and is now forty-four. (Cover Letter, ECF No. 880-1.) Further, Martin presents evidence that he has been rehabilitated during the twenty intervening years. While in prison, Martin has completed drug education, non-residential drug treatment, a 500-hour residential drug treatment program, and classes on work habits, forklift safety, decision-making, alternatives to violence, and anger management. (ECF Nos. 859-2, 859-3, 859-5, 859-6, 875, 880-1.) Martin also has a promising reentry plan. (ECF Nos. 880-1, 859-7.) Upon release, he plans to reside with his father and stepmother in New Port Richey, Florida, away from the negative influences he faced in Maryland. (ECF Nos. 859-1, 859-7, 859-8.) His stepmother is the CEO of the End Recidivism Project, and she has pledged to "assist [Martin] with transitional housing, education, job and honing in on core values which will assist him in being productive in a positive way." (ECF No. 859-7.)

While Martin's rehabilitation efforts and reentry plan are commendable, on balance, this Court concludes that Martin's instant arguments do not warrant compassionate release. Less than two years ago, this Court held that Martin was not eligible for immediate release "given the serious nature of Martin's offenses, the strength of the evidence against him, and his recidivist past." (Order Granting Reduction in Sentence, ECF No. 868.) Martin has not done anything substantial to tip the balance of these factors, and there are strong arguments remaining against Martin's immediate release.

First, the nature and circumstances of Martin's offenses are serious. Martin and his co-Defendants trafficked large quantities of drugs, including cocaine and heroin, and were involved in the commission of multiple robberies that resulted in the gruesome killing of four people by gunshot to the back of the head. (*See* PSR ¶¶ 8, 13, 15, 16 18-21.) Further, while Martin was acquitted at trial of the murder charges, Judge Davis noted that "Martin was there [and] . . . had knowing involvement [in the murders.]" (Sentencing Transcript 45, ECF No. 710.) Judge Davis' finding is relevant to this Court's analysis of the nature and circumstances of Mr. Martin's offense and weighs against compassionate release.

Martin's personal history and characteristics also weigh against release. This was not Martin's first drug conviction. He has two prior adult convictions, one conviction for narcotics trafficking and one conviction for possession of a firearm by a convicted felon. (PSR ¶¶ 45-48.) He has numerous juvenile offenses and fourteen prior arrests. (*Id.* ¶¶ 51-66.) Further, Martin's disciplinary history, both in prison and on supervised release, is poor.[5] (Gov. Resp., ECF No. 864.) Martin's criminal activity was continuous until he received the federal sentence he is currently serving. This weighs against compassionate release.

As for "the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public," this factor weighs against compassionate release. Martin is prone to recidivism and has several serious prior convictions and a lengthy criminal history. (Gov. Resp., ECF No. 864.) More recently, upon completion of Martin's intensive 500-hour drug program, Martin's Specialty Treatment Specialist noted that

[5] Martin's disciplinary history in prison includes seventeen disciplinary infractions, including seven citations for possession of narcotics or alcohol, two citations for possessing a dangerous weapon, and three citations for fighting. Specifically, Martin has: used free weights to strike another inmate; was involved in a fight where an inmate was stabbed eight times; and was found with drugs such as amphetamines, K2, and marijuana. (BOP Inmate Disciplinary Record, ECF No. 864-1.)

Martin is likely to relapse if he is exposed to peers who engage in criminal behavior and substance abuse. (Medical Notice, ECF No. 882.) Accordingly, it is only rational to conclude that incarceration is still necessary to dissuade Martin from future offenses and to protect the public.

Applicant Details

First Name	**Anthony**
Middle Initial	**E**
Last Name	**Birong**
Citizenship Status	**U. S. Citizen**
Email Address	**abirong@lawnet.uci.edu**
Address	**Address** Street **5104 Palo Verde Rd.** City **Irvine** State/Territory **California** Zip **92617** Country **United States**
Contact Phone Number	**562-370-6354**

Applicant Education

BA/BS From	**Norwich University**
Date of BA/BS	**September 2019**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**UC Irvine Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Barron, Ben
Ben.Barron@usdoj.gov
Tonner, Grace
gtonner@law.uci.edu
(949) 824-4037
Leslie, Christopher
cleslie@law.uci.edu
949-824-5556

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Judge Walker:

I am a rising third-year law student at the University of California, Irvine School of Law (UCI Law), and I am applying for a clerkship in your chambers for the 2024–25 term. I am particularly interested in clerking in your chambers because of your extensive criminal law experience. I believe that my training at UCI Law, my externships with the Honorable Otis D. Wright II and the United States Attorney's Office, and my military experience will make me a valuable addition to your chambers.

Prior to law school, I served for six years on active duty in the United States Navy as a Special Warfare Boat Operator (SWCC). I held the roles of lead navigator and lead communicator. As lead navigator, I conducted thorough research, drafted detailed navigation plans, and frequently presented to senior officers. As lead communicator, I collaborated with various government agencies and acted as my team's liaison during dynamic military operations and exercises. Over the course of six years and two deployments, I received the Joint Special Achievement Medal and two Navy and Marine Corps Achievement Medals for outstanding performance of my duties. My attention to detail, eagerness to learn, and positive attitude allowed me to thrive in high-stress situations. I am a 100% Permanent and Total Disabled Veteran. I am confident that these experiences will make me a motivated, productive, and valued member of your chambers.

My education, legal experiences, and my strong legal research and writing skills will help me succeed as your clerk. In my first year at UCI Law, I received the second-highest grade in Lawyering Skills, the legal research and writing course at UCI Law. Last summer, I externed for the Honorable Otis D. Wright II. I was exposed to a wide range of criminal and civil cases, and I learned how judges and clerks balance judicial efficiency and justice. As an extern for the United States Attorney's Office last fall, I researched criminal statutes and criminal procedure and helped Assistant United States Attorneys draft indictment memos, pretrial motions, sentencing positions, and appellate briefs. I will be returning to the office this fall as a certified law student, where I will make appearances before magistrate judges and first chair misdemeanor trials. As a research assistant to Professor Christopher Leslie, I have extensively researched antitrust law, civil procedure, and banking practices. As a research fellow for Professor Grace Tonner, I provide verbal and written feedback to first-year law students. I have received pro bono awards for my volunteer legal services at the Veterans Legal Institute, Community Legal Aid SoCal, and the United States Marine Corps Camp Pendleton Legal Assistance Office. Finally, I am a member of the *UC Irvine Law Review*.

I hope to translate my experiences and credentials into a successful tenure as your clerk. Enclosed you will find my resume, a writing sample, my academic transcripts, and letters of recommendation from Professor Christopher Leslie, Professor Grace Tonner, and Assistant United States Attorney Ben Barron. Thank you for your consideration.

Very Respectfully,

Anthony Birong

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

EDUCATION

University of California, Irvine, School of Law, Irvine, CA
Juris Doctor expected May 2024, GPA: 3.45

Activities: *UC Irvine Law Review*, Associate Editor
Veterans Law Society, Co-Founder & Secretary
Criminal Law Society, Board Member
Lawyering Skills Research Fellow for Professor Grace Tonner

Pro Bono: United States Marine Corps Camp Pendleton Legal Assistance Office
Veterans Legal Institute
Community Legal Aid SoCal

Norwich University, Northfield, VT
Bachelor of Science in Criminal Justice, *summa cum laude*, September 2019, GPA: 3.92

LEGAL EXPERIENCE

United States Attorney's Office, Santa Ana, CA — Expected August – December 2023
Certified Law Student

Morgan, Lewis & Bockius LLP, Costa Mesa, CA — May – July 2023
Summer Associate

University of California, Irvine School of Law, Irvine, CA — May 2022 – Present
Research Assistant to Professor Christopher Leslie. Work closely with professor to research antitrust law and banking practices. Present factual and legal findings to professor. Provide analysis and recommendations on draft law review articles.

United States Attorney's Office, Santa Ana, CA — August – December 2022
Criminal Division Extern. Reviewed police reports, investigation reports, criminal records, and police body camera footage. Observed execution of search warrants, proffers, reverse proffers, and jury trials. Assisted federal law enforcement officers and Assistant United States Attorneys draft search warrants, indictment memos, pretrial motions, sentencing positions, and appellate briefs.

United States District Court, Central District of California, Los Angeles, CA — May – August 2022
Judicial Extern to the Honorable Otis D. Wright II. Analyzed, researched, and briefed matters filed with court. Reviewed and edited orders and opinions. Researched, prepared, and drafted memoranda, orders, and opinions addressing state and federal law, commercial disputes, and criminal law.

EMPLOYMENT

United States Navy Reserve, SEAL Team 17, Coronado, CA — July 2021 – July 2023
Special Warfare Boat Operator (SWCC). Maintain administrative and physical requirements necessary to deploy on an as-needed basis. Attend monthly requalification training necessary for special operations deployments including parachute, cold weather, and weapon proficiency training.

United States Navy, Special Boat Team 12, Coronado, CA — July 2015 – July 2021
Special Warfare Boat Operator (SWCC). Studied local geography and customs to plan special operations missions in support of Global War on Terrorism. Collaborated with military and government agencies. Drafted research documents and presented plans to senior military officials. Trained and instructed foreign military special operations groups on maritime special operations tactics and counterterrorism.

SKILLS AND INTERESTS

Certified SCUBA diver. Licensed skydiver. Interests include hiking, traveling, and golfing.

(Print This Page)

Birong, Anthony E. (40962858)

Birong, Anthony E. (40962858)
LAW (SCHOOL OF LAW)

Your transcript below is not official and is informational only. It is not for use as a verification of enrollment.

Official transcripts, verifications of enrollment, or other records may be requested from the University Registrar. Refer to the Services section on our website.

********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

Previous Degrees

B.S. 09/19 NORWICH UNIV

Memoranda

LAW 506A - DEANS AWARD - FALL 2021

PRO BONO - 50 HOUR AWARD - 2021-22

PRO BONO - ACHIEVEMENT (50+ HRS) - 2022-23

2021 Fall Semester

PROCEDURAL ANALYSIS	LAW	504	4.0	B	12.0	
LAWYERING SKILLS I	LAW	506A	3.0	A+	12.9	
LEGAL PROFESSION I	LAW	507	3.0	B-	8.1	
LEG RESEARCH PRAC	LAW	508	1.0	S	0.0	SU
COM LAW: CONTRACTS	LAW	500	4.0	A	16.0	

Term Totals ATTM: 14.0 PSSD: 14.0 GPTS: 49.0 GPA: 3.500

Cumulative Totals ATTM: 14.0 PSSD: 14.0 GPTS: 49.0 GPA: 3.500

2022 Spring Semester

COMMON LAW: TORTS	LAW	501	4.0	A	16.0	
STATUTORY ANALYSIS	LAW	503	3.0	B	9.0	
CON ANALYSIS	LAW	502	4.0	B-	10.8	
LAW SKILLS II	LAW	506B	3.0	A	12.0	
LEG & STAT INTERP.	LAW	580	2.0	B+	6.6	

Term Totals ATTM: 16.0 PSSD: 16.0 GPTS: 54.4 GPA: 3.400

Cumulative Totals ATTM: 30.0 PSSD: 30.0 GPTS: 103.4 GPA: 3.447

2022 Fall Semester

CRIMINAL PROCEDURE	LAW	513	3.0	A-	11.1	
EVIDENCE	LAW	514	3.0	A	12.0	
PART-TIME EXTRNSHIP	LAW	597PT	4.0	S	0.0	SU
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
PART-TIME EXT SUM	LAW	597X	4.0	S	0.0	SU
LAW REVIEW	LAW	598R	1.0	S	0.0	SU

Term Totals ATTM: 6.0 PSSD: 6.0 GPTS: 23.1 GPA: 3.850

Cumulative Totals ATTM: 36.0 PSSD: 36.0 GPTS: 126.5 GPA: 3.514

2023 Spring Semester

BUSINESS ASSOC	LAW	511	3.0	B+	9.9
PROPERTY	LAW	517	4.0	B+	13.2
REMEDIES	LAW	518	3.0	B	9.0
CRIM TRIAL ADVOCACY	LAW	5941	2.0	A-	7.4
RACE LAW CAPITALISM	LAW	5778	3.0	B+	9.9
RESEARCH FELLOW	LAW	298T	2.0	S	0.0 SU

Term Totals **ATTM: 15.0** **PSSD: 15.0** **GPTS: 49.4** **GPA: 3.293**

Cumulative Totals **ATTM: 51.0** **PSSD: 51.0** **GPTS: 175.9** **GPA: 3.449**

INCOMPLETE GRADES:	0	**UNITS:**	0.0
NR GRADES:	0	**UNITS:**	0.0
P/NP GRADES:	0	**UNITS:**	0.0
S/U GRADES:	6	**UNITS:**	14.0
W GRADES:	0	**UNITS:**	0.0

GRADE UNITS ATTEMPTED	51.0	**GRADE POINTS**	175.9	**UC GPA**	3.449
TOTAL UNITS PASSED	51.0	**UNITS COMPLETED**	65.0		

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United States Department of Justice

United States Attorney's Office
Central District of California

Benjamin R. Barron
Phone: (714) 338-3536
E-mail: Ben.Barron@usdoj.gov

Ronald Reagan Federal Bldg & U.S. Courthouse
411West Fourth Street, Suite 8000
Santa Ana, California 92701

June 8, 2023

To whom it may concern,

I am writing to enthusiastically recommend Anthony Birong for a judicial clerkship in your chambers. Anthony served as a law school extern with my office during his Fall 2022 semester. He will be returning to my office as an extern this coming fall. Anthony stood out early into his externship. He sought out difficult assignments, produced excellent work, and was a pleasure to work with. His research memos and draft language for briefs were well organized, detailed, and hit all the salient points. Anthony met all deadlines and did a great job communicating progress.

Early into his externship, we felt comfortable trusting Anthony to take on important assignments. For example, Anthony provided research support and draft language for a Ninth Circuit brief on a novel issue of statutory construction. Anthony's analysis was thoughtful and comprehensive, and we used much of his draft language in the filed brief. As a further example, Anthony prepared a research memorandum addressing the anticipated trial defense in a murder case, and he drafted a related jury instruction used by the prosecution team.

In terms of demeanor, Anthony has a positive and even-tempered attitude. He worked well with his fellow externs and my office's attorneys. Moreover, we were impressed with Anthony's passion for public service. He often spoke about how his experience in the United States Navy led him to apply to law school, and about his pro bono work for veterans and victims of domestic violence. It was clear to me and the rest of my office that Anthony genuinely wants to devote his legal career toward helping his community and others in need.

Ultimately, I am confident that Anthony's passion and work ethic will benefit your chambers just as it has my office. I recommend him without reservation.

You are welcome to contact me if you have any questions or want any additional information.

Very truly yours,

Benjamin R. Barron
Assistant United States Attorney
Chief, Santa Ana Branch Office